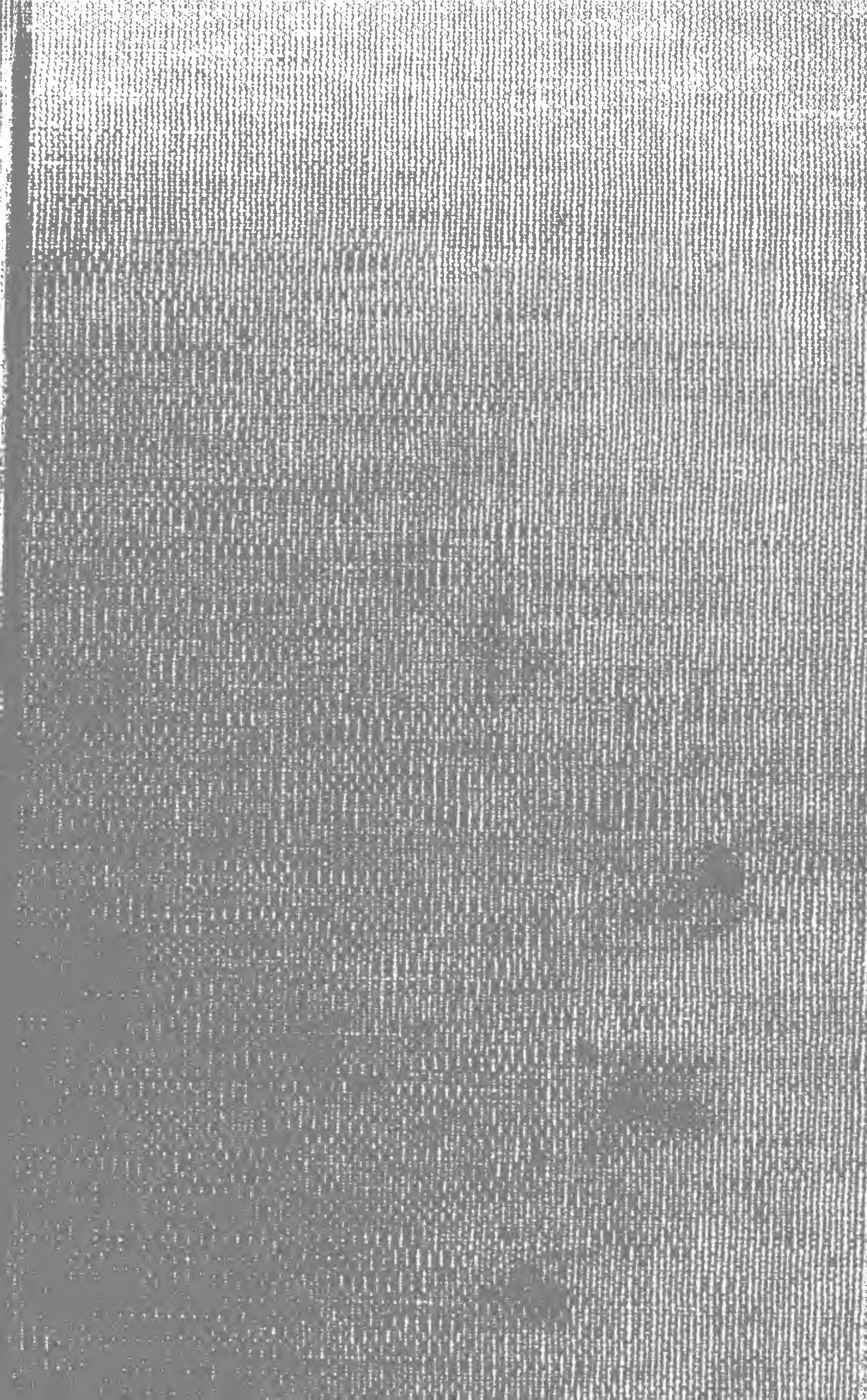

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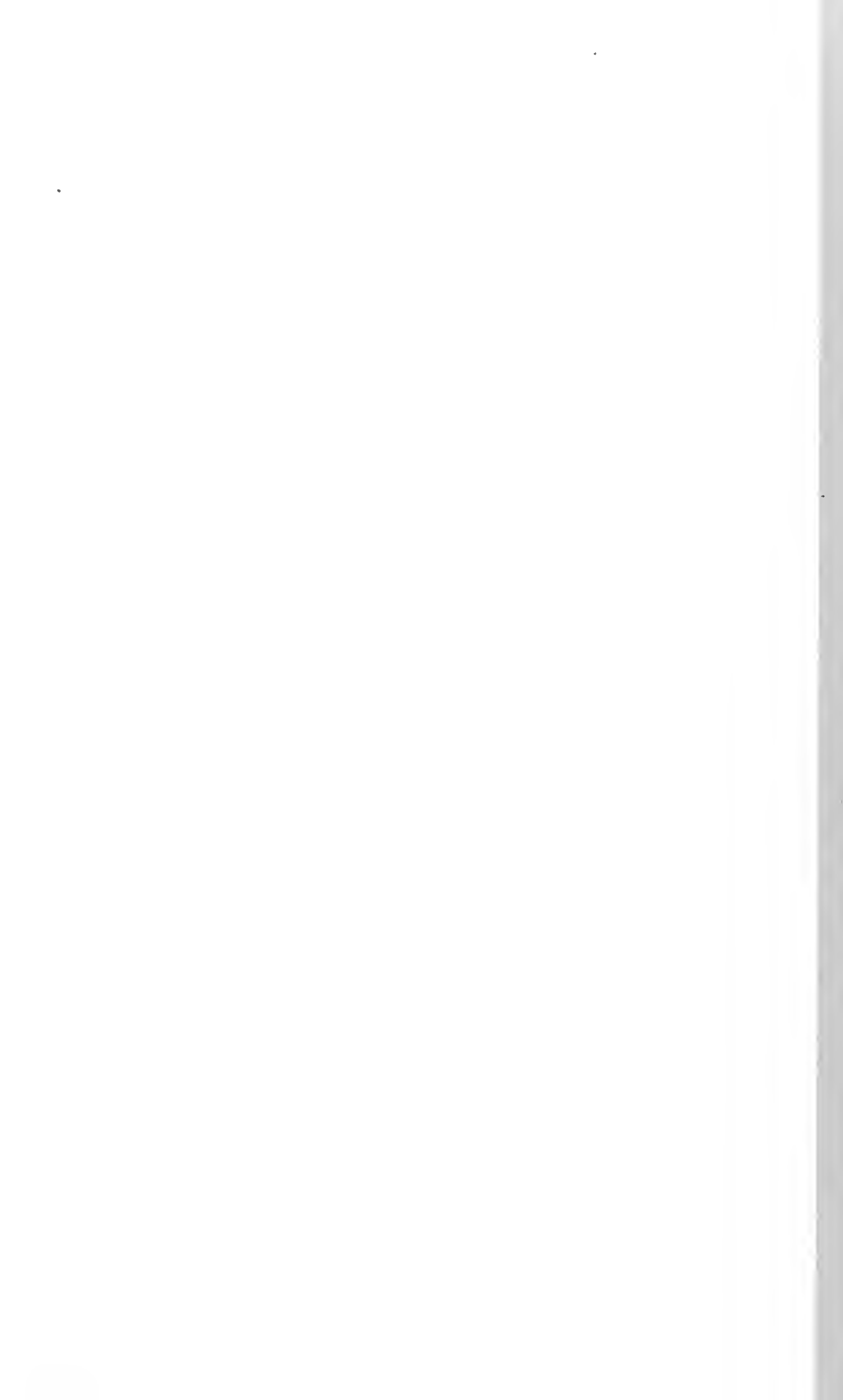


n. 27186

No. 13685

United States Court of Appeals
for the Ninth Circuit.

H. F. SCHAUB,

Appellant,

vs.

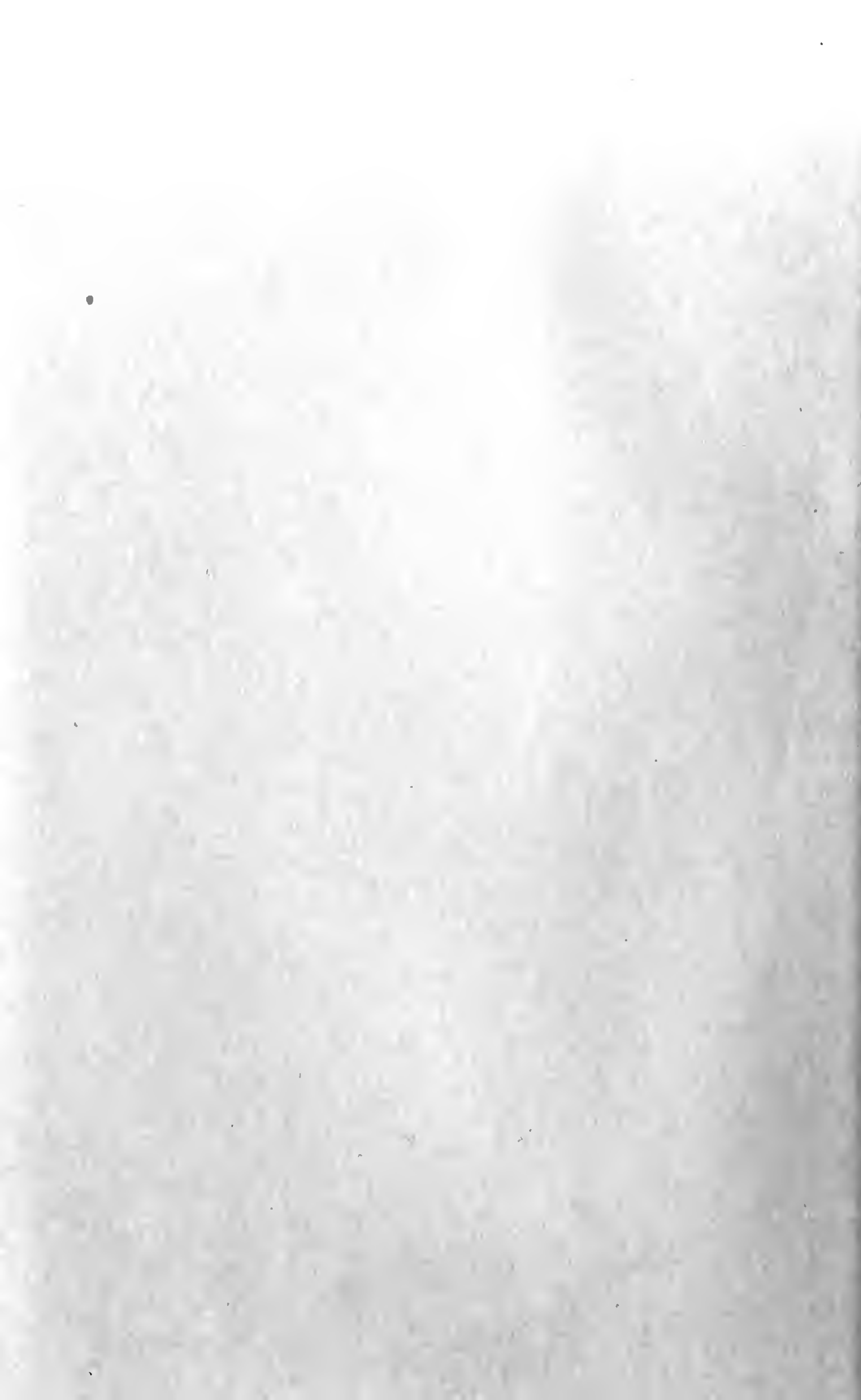
UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court for the Territory of Alaska First Division

Phillps & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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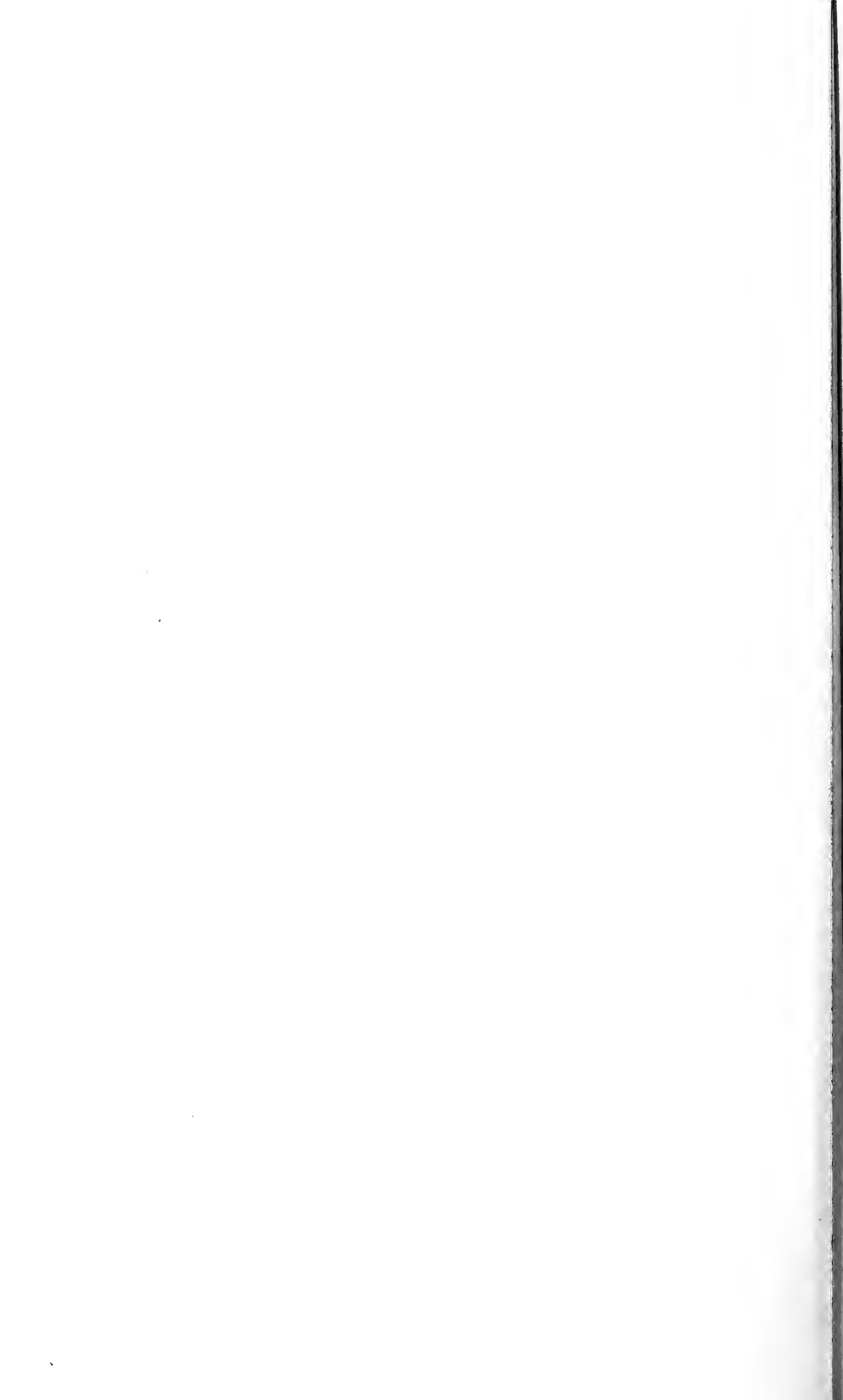

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

H. F. SCHAUB,

Defendant.

COMPLAINT

The United States of America, by P. J. Gilmore, Jr., United States Attorney for the First Judicial Division, Territory of Alaska, acting under the direction of the Attorney General of the United States and at the request of the Secretary of Agriculture, for its complaint alleges as follows:

I.

This is a civil action brought by the United States, and accordingly, the judisdiction of this Court is invoked under 28 U.S.C.A. 1345.

II.

The defendant, H. F. Schaub, at all times herein mentioned resided in and has his principal place of business at Ketchikan, Alaska.

III.

The plaintiff is the owner of a tract of land comprising 37.5 acres, more or less, situated in and being a part of the Tongass National Forest, Revil-

lagigedo Island, Alaska, located on and near Whipple Creek, about 11.5 miles north of the City of Ketchikan, and more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

IV.

The 37.5 acres of land described in paragraph III were and now are a part of 91.13 acres of land, more or less, set apart and appropriated by the Regional Forester of the United States Forest Service, Department of Agriculture, Juneau, Alaska, September 3, 1940, as a public service site pursuant to the provisions of Order of Secretary of Agriculture of Feb. 1, 1926, and Regulations, Nat'l Forest Service Manual, pp. 57-L and 61-L.

V.

The 37.5 acres of land described in paragraph III were on February 9, 1951, set apart, appropriated and reserved for the use of the Bureau of

Public Roads, Department of Commerce, as a source of road building material by the Regional Forester, U. S. Forest Service, Department of Agriculture, Juneau, Alaska.

VI.

The Secretary of Interior by Public Land Order No. 734, dated July 20, 1951, and published July 26, 1951, in 16 Federal Register 7329, withdrew the 37.5 acres of land described in paragraph III from all forms of appropriation under the public land laws, including the mining laws, and reserved for the use of and administration by the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, as the Whipple Creek Public Service Site.

VII.

Beginning with the approximate date of June 1, 1934, and continuing up to about August 22, 1951, plaintiff, acting by and through the United States Forest Service, Department of Agriculture, and Bureau of Public Roads, Department of Commerce, its officers, servants, agents and employees, in the execution of the laws of the United States and regulations thereof, appropriated for the use and occupancy by the United States Forest Service and Bureau of Public Roads the 37.5 acres of land described in paragraph III, by prospecting, searching for, surveying, finding and discovering sand, gravel and stone in and on the said land; and during said period, particularly, but not limited to the calendar years of 1934, 1942, 1948, 1949, 1950 and 1951, used

and occupied said land, mined and removed and authorized under contract the mining and removal from the said 37.5 acres of land, of large quantities of sand, gravel and stone in the building, construction, repair and maintenance of roads, highways and other government works.

VIII.

Defendant unlawfully claims a right, title and interest in and to the 37.5 acres of land described in paragraph III, and on or about June 21, 1951, unlawfully and without any right went upon said land and posted a notice of a claim of right, title and interest in and to the said 37.5 acres of land; and on or about August 22, 1951, defendant unlawfully and without any right erected barricades across and upon the right-of-way built and constructed by plaintiff for ingress and egress to, upon and from said 37.5 acres of land; and on divers other days between that day and the beginning of this action, the defendant, his servants, agents and employees unlawfully moved a trailer house upon said 37.5 acres of land, and removed timber and overburden, mined and removed sand, gravel and stone, and are engaging in removing timber and overburden, mining and removing sand, gravel and stone from within the boundaries of the said 37.5 acres of land; and is threatening to mine, remove, carry away and convert to his own use sand, gravel and stone from the 37.5 acres of land, all to the great damage of the plaintiff.

IX.

Defendant, his servants, agents and employees have since on or about August 22, 1951, unlawfully prevented plaintiff from the free use of the only means of ingress and egress to, upon and from the said 37.5 acres of land or portion thereof described in paragraph III, and have prevented plaintiff from using and occupying said land, and mining and removing sand, gravel and stone from the 37.5 acres of land, all to the great damage of the plaintiff.

X.

The actions of the defendant, his servants, agents and employees, by barricading the right-of-way to the said 37.5 acres of land described in paragraph III; by placing a trailer house upon said 37.5 acres of land; by removing timber and overburden, mining and removing sand, gravel and stone from said 37.5 acres of land; by preventing plaintiff, its officers, servants, agents, employees and contractors from the free ingress and egress to, upon and from said 37.5 acres of land; by preventing plaintiff, its officers, agents, employees and contractors from using and occupying said land, mining and removing sand, gravel and stone from said 37.5 acres of land; and threatening to continue to so barricade said right-of-way, leave the trailer house on said land, to remove timber and overburden, mine and remove sand, gravel and stone from said land; to prevent plaintiff, its officers, servants, agents, employees and contractors from the free ingress and egress to, upon and from said land, using and oc-

cupying said land, and mining and removing sand, gravel and stone from said land in violation of the rights of plaintiff, constitutes a serious interference with the United States and its administration of the Tongass National Forest, and its administration of the Tongass National Forest, and administration of the Bureau of Public Roads, its use and occupancy of lands appropriated and reserved for governmental use and in carrying out its obligations to the public in the building, constructing, repair and maintenance of roads, highways and other governmental works.

XI.

Plaintiff has entered into a valid contract with Manson-Osberg Company, a corporation, for the construction, improvement, repair and maintenance of the North Tongass Highway, Revillagigedo Island, Alaska. The contract provides that Manson-Osberg Company may obtain, borrow material from the 37.5 acres of land described in paragraph III, and by reason of defendants unlawful and wrongful acts complained of herein, plaintiff, its officers, servants, agents, employees and contractors have been and are being prevented from constructing, improving, repairing and maintaining said highway, all to the great damage to plaintiff.

XII.

That while this action is pending, the defendant intends to and will,, unless enjoined, continue to barricade plaintiffs right-of-way to said 37.5 acres of land described in paragraph III; leave a trailer

house on said land, remove timber and overburden, mine and remove sand, gravel and stone from said land; interfere with and prevent plaintiff from free ingress and egress to, upon and from said land; prevent plaintiff from using and occupying said land; and prevent plaintiff from mining and removing sand, gravel and stone from said land, all in violation of the rights of the United States, and an injunction is necessary to restrain the defendant from committing the acts aforesaid.

Wherefore, the plaintiff prays:

1. That this Court issue a temporary injunction restraining the defendant, his servants, agents and employees until further order of this Court, from: Barricading plaintiffs' right-of-way to, on and from the said 37.5 acres of land described in paragraph III; using and occupying said land; mining and removing sand, gravel and stone from said land; interfering with plaintiff, its departments, agencies, officers, servants, agents, employees and contractors in using and occupying said land, and mining and removing sand, gravel and stone from said land;

2. That defendant be required to remove from the said 37.5 acres of land the trailer house and any and all other property and equipment belonging to defendant;

3. That defendant be required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of land and the right-of-way to, on and from said land;

4. That defendants claim of right, title and interest be declared invalid, insofar as his claim of right, title and interest embraces or constitutes a part of the said 37.5 acres of land;

5. That upon full hearing a permanent injunction be issued;

6. That the damages suffered by plaintiff by reason of the unlawful acts of the defendant herein complaint of be ascertained and that judgment be entered in favor of the plaintiff and against the defendant for the amount of such damages;

7. That the plaintiff recover its costs and attorney fees herein;

8. For such further relief as may be just.

/s/ P. J. GILMORE, JR.,
United States Attorney,
Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

I, P. J. Gilmore, Jr., being first duly sworn, on oath, depose and say:

That the United States Government is the plaintiff in the foregoing complaint, that I have read the said complaint and know the contents thereof, and that the facts stated therein are true and correct, as I verily believe.

/s/ P. J. GILMORE, JR.

Subscribed and sworn to before me this 3rd day of October, 1951.

[Seal] /s/ A. V. SIMONSEN,
Deputy Clerk of the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

I, Wilfred Stump, am the attorney for H. F. Schaub, and am authorized to, and hereby accept and acknowledge service on behalf of H. F. Schaub, defendant herein, this 3rd day of October, 1951.

/s/ WILFRED C. STUMP,
Attorney for Defendant.

(True Copy)

Correction Memorandum No. 11
Whipple Creek Group
Section 4, North Tongass Highway

1. The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building material:

Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence N. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence

S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 + 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

Correction Memorandum No. 11 Approved.

Date: Feb. 9, 1951.

In evidence.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester.

[Title of District Court and Cause.]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause coming on to be heard on the motion of plaintiff for a preliminary injunction and due notice having been given to the defendant and the Court having considered the statements of counsel and being fully advised in the premises, it finds:

That the defendant claims a right, title and interest in and to the 37.5 acres of land described in Paragraph 3 of the complaint filed in the above-entitled cause and that on or about June 21, 1951, the defendant went upon said land and posted a notice of a claim of right, title and interest in and to the said 37.5 acres of land under a mineral entry; and on or about August 22, 1951, the defendant

erected barricades across and upon the right-of-way built and constructed by plaintiff for ingress and egress to, upon and from said 37.5 acres of land; and on divers other days between that day and the beginning of this action, the defendant, his servants, agents and employees moved a trailer house upon said 37.5 acres of land, and removed timber and overburden, mining and removing sand, gravel and stone and are engaging in removing timber and overburden, mining and removing sand, gravel and stone from within the boundaries of the said 37.5 acres of land; and is threatening to mine, remove, carry away and convert to his own use sand, gravel and stone from the said 37.5 acres of land and that defendant, his servants, agents and employees have since on or about August 22, 1951, prevented plaintiff from the free ingress and egress to, upon and from the said 37.5 acres of land herein above mentioned and have prevented plaintiff from using and occupying said land and mining and removing sand, gravel and stone from the said 37.5 acres of land, all to the great damage of the plaintiff.

It Is Ordered, Adjudged and Decreed that pending further order of this Court H. F. Schaub, his servants, agents, representatives, employees and successors, and all other persons in active concert and participation with them, be and they hereby are restrained and enjoined from:

1. Barricading plaintiffs' right-of-way to, on and from the said 37.5 acres of land herein above

referred to and particularly described in Paragraph 3 of the Complaint filed in the above-entitled cause;

2. Using and occupying said land; mining and removing sand, gravel and stone from said land;

3. Interfering with the plaintiff, its departments, agencies, officers, servants, agents, employees and contractors in using and occupying said land, and mining and removing sand, gravel and stone from said land;

4. That defendant be required to remove from the said 37.5 acres of land the trailer house and all other property and equipment belonging to the defendant;

5. That the defendant be required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of land and the right-of-way to, on and from said land.

It Is Further Ordered, Adjudged and Decreed that this order should be effective from and after .... p.m., October 15, 1951.

Done in open Court this 15th day of October, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

Approved.

Two copies received this 15th day of October, 1951.

/s/ W. C. STUMP,
Attorney for Defendant.

[Endorsed]: Filed October 15, 1951.

[Title of District Court and Cause.]

MINUTE ORDERS

Monday, October 15, 1951

This matter came before the court for hearing on plaintiff's petition for the issuance of the Preliminary Injunction. Patrick J. Gilmore, Jr., United States Attorney, for plaintiff; W. C. Stump for defendant. Mr. Stump advised the court that he had stipulated with plaintiff that the preliminary injunction should issue and that they would get together and agree upon the terms of same and present the order later this day for the signature of the court. Counsel stated that they wanted this matter heard on its merits during this present term of court.

[Title of District Court and Cause.]

MINUTE ORDERS

Friday, December 14, 1951

Upon reading the written Motion of defendant, which was supported by an Affidavit of W. C. Stump, the Court signed an Order giving defendant until December 30, 1951, to file his Answer.

Friday, January 25, 1952

This case came before the court for trial without a jury. The Government was represented by Stanley D. Baskin, Assistant United States Attorney; W. C. Stump appeared for plaintiff and on his Motion, Donald McLellan Davidson was admitted as associ-

ate counsel for this case only. Plaintiff made an opening statement, following which this case was recessed till 2 o'clock p.m.

With all parties personally present, the trial of this case was resumed. Defendant made his opening statement to the Court. A certified copy of Forest Service Manual P-III was admitted in evidence as plaintiff's Exhibit # 1. A certified copy of the Forest Service Basic Regulations, etc., was admitted in evidence as Exhibit # 2. The Complaint was allowed to be amended and the amendment was made by the Court. Thereupon, C. M. Archbold was duly sworn and examined.

Saturday, January 26, 1952

With all parties personally present and with the witness, C. M. Archbold, on the stand, the trial of this case was resumed. Defendant moved to strike Paragraph 4 of the Complaint, which was denied after arguments. Thereafter C. F. Wyller was sworn and examined.

Monday, January 28, 1952

With all parties personally present, the trial of this case was resumed. Plaintiff called E. C. McCann, W. A. Chipperfield, Einar H. Hyberg and Hugh A. Stoddard who were sworn and examined, upon which plaintiff rested. Defendant moved to strike plaintiffs claim for damages, which was denied. Defendant also moved to strike plaintiff's case—on which Court reserved ruling. Thereupon defendant was sworn for testimony in his own behalf. A Notice of Location of Placer Claim for

"Whipple Creek No. 1" was admitted in evidence as Defendant's Exhibit A and thereupon defendant rested, upon which both sides rested. The Court requested counsel to file briefs and allowed plaintiff two weeks, defendant also two weeks for answering brief and plaintiff ten days for reply brief if necessary.

At Anchorage, February 16, 1952

Upon consideration of a written motion, filed by plaintiff, asking for an extension of time until February 15th in which to file its brief herein, the Court signed an Order allowing such motion.

Friday, May 16, 1952

There came Patrick J. Gilmore, Jr., United States Attorney, who presented to the court Findings, Conclusions and Judgment in this case, advising that he had served copies on plaintiff's counsel quite some time ago, but had not heard from them. The Court accepted the pleadings for examination before signing same.

Saturday, May 17, 1952

Findings, Conclusions and Judgment having heretofore been presented to the Court by plaintiff, and the same having been accepted for consideration, the Court at this time duly signed the same.

Wednesday, July 2, 1952

Upon consideration of defendant's Motion for Judgment notwithstanding the Decision of the Court, and in the alternative, for a new trial, the Court ruled that the Motion for Judgment notwithstanding the Decision is available only to the plain-

tiff; for this reason the motion would be denied. Motion for a new trial is also denied.

Friday, September 26, 1952

This case came before the court for hearing on defendant's Motion for an Order Directing Transmittal of Exhibits Offered and Refused as Part of the Record; also plaintiff's Motion for an Order Denying defendant's Motion for transmittal of copies of Exhibits offered and refused. Defendant had submitted the matter without oral argument. Edward A. Merdes appeared for plaintiff. After hearing plaintiff the Court ruled that if the exhibits were not left with the Court at the time of trial, the motion could not be granted. The exhibits were not left with the court at the time of being offered, but were attached to defendant's Motion.

[Title of District Court and Cause.]

NOTICE

Please take notice that the defendant is filing written interrogatories to be answered by the appropriate agent in the U. S. Forest Service, Dept. of Agriculture, and the Bureau of Public Roads, Dept. of Commerce, in the Ketchikan district of said departments pursuant to the Federal Rules of Civil Procedure. Defendant's written interrogatories are attached hereto and the plaintiff is invited to propound cross-interrogatories.

Dated at Ketchikan, Alaska, this 26th day of October, 1951.

/s/ W. C. STUMP,
Attorney for Defendant.

Defendant's Interrogatories

1. Under what sub-section of 36CFR 251.22 did the Regional Forester make the appropriation alleged in Paragraph 4 of the Complaint?

2. Under what statutory authority of the United States of America did the Regional Forester act in making the appropriation alleged in Paragraph 4 of the Complaint?

3. Do you have the original order making such appropriation on Sept. 3, 1940, and if so would you submit a true and correct copy thereof?

4. Will you please state the specific acts done by your department in complying with the applicable law or regulation for the perfection of such appropriation and the dates of said compliance as alleged in Paragraph 4 of the complaint?

5. Please specify and identify under which law of the United States or Departmental regulation by which the Regional Forester of the U. S. Forest Service at Juneau, Alaska, on February 9, 1951, made the appropriation claimed in Paragraph 5 of the complaint.

6. Please produce a true and correct copy of the order of appropriation alleged in Paragraph 5 of the complaint.

7. Will you please state the specific acts done by your department in complying with the applicable law or regulation for the perfection of such appropriation and the dates of said compliance as alleged in Paragraph 5 of the complaint?

8. Please specify what law or regulation the U. S. Forest Service and Bureau of Public Roads were executing in the appropriation and use of said land as alleged in Paragraph 7 of the Complaint.

9. Please specify the date sand, gravel and stone were mined and removed, together with the amounts thereof as alleged in Paragraph 7.

10. Please state the actual area used within said 37.5 acres of land in the removal of said sand, gravel and stone, as alleged in Paragraph 7 of the Complaint.

11. Is it not a fact that the material removed as alleged in paragraph 7 of the Complaint has been limited to the open creek bed of Whipple Creek which flows through said 37.5 acres of land?

12. Was it apparent from visual observation of said Whipple Creek within the boundaries of said 37.5 acres of land that the same contained a deposit of sand, gravel and stone?

13. Please state whether or not the operations alleged in Paragraph 7 of the Complaint were continuous or intermittent.

14. Please state whether the operations alleged

in Paragraph 7 of the Complaint involved permanent improvements and if so, the kind, character and cost thereof.

15. Please state whether or not there were any operations for the removal of sand, gravel and stone on said 37.5 acres of land on June 21, 1951.

16. Please state the method and machinery used by the Bureau of Public Roads in removing sand, gravel and stone from said 37.5 acres of land for the maintenance and repair of Government roads in the Ketchikan area.

17. How long prior to June 21, 1951, had there been any equipment on said 37.5 acres of land for the removal of sand, gravel and stone other than that referred to in Question 16?

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1951.

[Title of District Court and Cause.]

PLAINTIFF'S ANSWERS TO DEFENDANT'S INTERROGATORIES 1-17

Comes now the defendant, United States of America, by Stanley D. Baskin, Assistant United States Attorney in and for the First Judicial Division, Territory of Alaska, and pursuant to Rule 33, Federal Rules of Civil Procedure, answers the interrogatories proposed by defendant, H. F. Schaub, as follows:

Interrogatory 1

Answer: The 91.13 acres of land were appropriated as a public service site pursuant to the provisions of 36 CFR 251.22 (1939 Supplement) and pursuant to the orders of William M. Jardine, Secretary of Agriculture, and William B. Greeley, Forester, dated February 1, 1926, and the regulations governing the administration of the United States Forest Service thereunder, as provided in the National Forest Manual, Regulations and Instructions, pages III, 57-L and 61-L, relating to reserve sites of the National Forests.

Interrogatory 2

Answer: Act of Congress dated June 4, 1897, 30 Stat. 35 and Act of Congress dated February 1, 1905, 33 Stat. 628.

Interrogatory 3

Answer: The appropriation consisted of the Regional Forester directing that the 91.13 acres of land be surveyed and set aside as a Public Service Site. The land was surveyed and posted during August 12 to 16, 1940, and approved by C. M. Archbold September 3, 1940. The survey was plated on the status maps and entered in the status records of the United Forest Service at Juneau and Ketchikan, Alaska. The final act of setting the 91.13 acres of land aside as a Public Service Site consisted of the approval of plat of the survey by Wellman Holbrook, Assistant Regional Forester, September 11, 1940.

Interrogatory 4

Answer: Answer to Interrogatory 4 is found in the answer to Interrogatory 3.

Interrogatory 5

Answer: Act of Congress dated June 4, 1897, 30 Stat. 35. Act of Congress dated February 1, 1905, 33 Stat. 628.

Interrogatory 6

Answer: A copy of the order of B. Frank Heintzelman, Regional Forester, United States Forest Service, Juneau, Alaska, dated February 9, 1951, was served on defendant's attorney, Wilfred Stump, on or about October 8, 1951, together with a Motion for Preliminary Injunction.

Interrogatory 7

Answer: The Bureau of Public Roads during May, 1950, prospected the 37.5 acres of land for deposits of sand, gravel, and stone for use in road building and other public purposes. On or about October 9, 1950, and again January 30, 1951, the Bureau of Public Roads advised the Regional Forester of the United States Forest Service, Juneau, Alaska, that it needed the 37.5 acres of land and requested that it be set aside for their use in the construction of highways, roads and other public purposes. The Bureau of Public Roads and the United States Forest Service determined that the 37.5 acres of land was valuable for its deposits of sand, gravel and stone for the use by the Bureau of Public Roads and other United States Government agencies for use in the construc-

tion of highways, roads, and other public works. On or about February 9, 1951, B. Frank Heintzelman, Regional Forester of the United States Forest Service, Juneau, Alaska, issued an order appropriating the 37.5 acres of land for the use of the Bureau of Public Roads.

The United States Forest Service and the Bureau of Public Roads has since about June 1, 1934, removed large quantities of sand, gravel, and stone from the 37.5 acres of land for use in construction of roads, highways, and other public works in the vicinity of Ketchikan, Alaska. The removal of the gravel, sand, and stone has been open and well known to the public.

Interrogatory 8

Answer: Acts of Congress dated June 4, 1897, 30 Stat. 35; Acts of Congress dated February 1, 1905, 33 Stat. 628; Federal Highway Act dated November 9, 1921, 42 Stat. 212, as amended, 23 USCA 1, et seq.

Interrogatory 9

Answer: The information requested in Interrogatory 9 was furnished defendant on or about October 8, 1951, in affidavit of Chester M. Archbold, dated October 8, 1951, and filed in the proceedings of this case.

Interrogatory 10

Answer: Approximately three acres.

Interrogatory 11

Answer: The actual area from which sand, gravel, and stone was mined and removed consisted

of the entire stream bed from Whipple Creek Bridge to a point above H. F. Schaub's discovery post, or a distance of about 1,600 feet. The average width developed is approximately 80 feet, but in places extending almost 200 feet in width, making a total of approximately three acres in the developed gravel pit. In developing the gravel pit the entire length and width was stripped of old down timber along the banks and in the streams. The current of the stream has been directed from one side of the channel to the other to undermine and wash the overburden away. During this procedure the stream bed has been lowered from 10 to 15 feet and has washed down many thousands of yards of gravel from upstream.

Interrogatory 12

Answer: Yes.

Interrogatory 13

Answer: The operation of developing the gravel pit on the 37.5 acres of land commenced in 1934 and has been continued from month to month and year to year up to the early part of 1951, as was necessary in developing the extensive road and highway system in the vicinity of Ketchikan, Alaska, and in the improvement and development of the resources of the Tongass National Forest.

Interrogatory 14

Answer: The operation of developing the Whipple Creek gravel pit required construction of a permanent 12- to 14-foot roadway leading from Tongass Highway to the gravel pit. The road leads

upstream along the north bank for a distance of approximately 1,400 feet. Permanent turnouts were maintained and improved. A permanent log loading ramp was constructed by A. W. Almquist, a contractor for the United States Forest Service, in 1949. The log ramp was left in its permanent position for use of the Bureau of Public Roads and is still on the property.

Interrogatory 15

Answer: On June 21, 1951, there probably was no actual removal of gravel being carried on by the Forest Service or Bureau of Public Roads. However, the pit was in good condition and ready for use when gravel, sand and stone were needed for the construction and improvements of highways, roads, and public projects in the vicinity of Ketchikan, Alaska.

On June 21, 1951, the Bureau of Public Roads and the United States Forest Service were planning and there was actual construction going on of extensive highway and road building work in which it was contemplated that more than 130,000 cubic yards of sand, gravel, and stone would be removed from the 37.5 acres of land commencing during the summer of 1951 and extending through 1952, until the projects were completed. This fact was well known to H. F. Schaub in particular, and the people of Ketchikan, Revillagigedo Island, Alaska, in general.

Interrogatory 16

Answer: Loaded trucks by hand and hand shovel, front-end loader attached to caterpillar 12

grader, power shovels, drag lines, bulldozers and the loading ramp constructed on the premises.

Interrogatory 17

Answer: Berg Construction Company, a contractor for the United States Forest Service in the construction and improvements of highways and roads in the vicinity of Ketchikan, Alaska, operated a dragline-shovel on the 37.5 acres of land during December, 1950, for the loading of trucks in removing sand, gravel and stone. Tractors were also used in the operation. The equipment was removed during December, 1950.

Dated at Juneau, Alaska, December 5, 1951.

/s/ STANLEY D. BASKIN,
Assistant U. S. Attorney.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 5, 1951.

[Title of District Court and Cause.]

ANSWER

The defendant for answer to the complaint alleges:

I.

Admits paragraph I.

II.

Admits paragraph II.

III.

Denies that plaintiff is owner of all the land described in paragraph III.

IV.

Admits that certain acts were performed as alleged in paragraph IV, but denies that any legal right existed permitting such acts to have any effect.

V.

Admits that a memorandum entitled "Correction Memorandum No. 11" was issued by the Regional Forester for Alaska, as alleged in paragraph V, but denies that any authority existed for the issuance thereof.

VI.

Admits paragraph VI, and adds that said order was effective on July 26, 1951, and that the withdrawal of said public land was "subject to valid existing rights."

VII.

Denies paragraph VII, except admitting that gravel has been removed from the creek bed which runs through said land very intermittently over the period stated.

VIII.

Denies paragraph VIII, except admits that defendant, on June 21, 1951, went upon a portion of said land and made a valid mineral entry thereon, and appropriated the same to his own use in conformity thereto.

IX.

Admits that defendant has taken possession of that part of said land upon which he made valid mineral entry, but denies that the same has damaged the plaintiff.

X.

Denies paragraph X of the complaint and specifically denies that defendant has removed any timber, overburden, sand, gravel or stone from said area, and alleges that all acts of defendant occurred on the area upon which defendant made valid mineral entry and was in possession thereof until restrained therefrom by order of this court.

XI.

Admits paragraph XI, but alleges that plaintiff entered into said contract with full knowledge that defendant had made mineral entry on part of said 37.5 acres of land and was in actual possession thereof.

XII.

Admits that part of paragraph XII which states that defendant would retain possession of that part of said area upon which he made mineral entry unless restrained therefrom.

First Defense

Defendant alleges that there is no legal authority for the Regional Forester of the United States Forest Service, Department of Agriculture, at Juneau, Alaska, any executive or employee of the Department of Agriculture, or of the Bureau of

Public Roads, or the Department of Commerce, to designate land within a National Forest of the United States of America for mineral development or use, to the exclusion of valid mineral entry being made on said land so designated. That said 37.5 acres of land was subject to mineral entry, as made by the defendant on June 21, 1951.

Second Defense

That if plaintiff claims said 37.5 acres of land on the theory of appropriation, the acts of plaintiff failed to constitute an appropriation; that the only use that has been made of any part of said 37.5 acres of land consisted of removal of sand and gravel from the creek bed which runs through said property; that a considerable portion of gravel removed from said 37.5 acres of land was from an area not claimed by defendant under his mineral entry; that the bulk of sand and gravel removed from the disputed area was done by private contractors and did not constitute the acts of the plaintiff; that plaintiff never made any permanent improvements on said disputed area; that the only structure on said disputed area consists of an abandoned log ramp which was placed there by a private contractor; that on June 21, 1951, said disputed area was unoccupied land within a National Forest of the United States of America and subject to mineral entry; that the Forest Service of the United States of America has no right to appropriate, develop, control, withdraw or use the minerals within the National Forests of the United States of America.

Third Defense

That on June 21, 1951, defendant made a valid mineral entry on the following property:

> From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less.

That part of said claim is within the area claimed by plaintiff; that defendant has complied with the laws of the United States of America and of the Territory of Alaska and is entitled to possession and control of the area herein described by authority of said laws; that said mineral entry was made prior to the time any part of said area was withdrawn from mineral entry by appropriate and lawful order.

Wherefore, defendant prays that plaintiff take nothing by its complaint herein; that the temporary restraining order heretofore entered by this court be dissolved and that defendant be restored to rightful possession of the property described in his Third Defense, and that he have his costs and dis-

bursements herein, and such other relief as the Court deems merited.

/s/ W. C. STUMP,
Attorney for Defendant.

[Endorsed]: Filed January 8, 1952.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The defendant admits, without prejudice to his claim of a valid mineral location, the allegations of pars. 3, 4, 5, 6, and 9 as amended, of the complaint; par. 7, except the allegation of use of the area; par. 8, except the allegations as to the removal of the timber and overburden by the defendant; par. 10, except the allegation as to the removal of timber and overburden and the allegation with reference to the obstruction of a way of ingress and egress, but admits obstructing the access road then existing; par. 11, with the qualification that the acts alleged were done by plaintiff with knowledge of defendant's location of a claim.

The parties agree that the first and second defenses present questions of law only, and plaintiff contends that the third defense is insufficient and will, in support thereof, produce evidence showing, or tending to show, that there was no discovery of mineral; that there was no valid location because the requirements of law with reference to staking, establishing and describing boundaries, etc., were

not complied with and that the location was made in bad faith. The plaintiff further contends that the area involved was not open to location on the ground that sand and gravel are not minerals within the meaning of the mining laws of the United States.

Dated at Juneau, Alaska, this 23rd day of January, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed January 25, 1952.

The attached opinion resulted in 16 U.S.C.A. 508b, allowing the Secretary of Interior to permit gravel mining. 2 U. S. Code Cong. Serv., 1950, p. 2662.

Opinion No. 5081

United States Department of Agriculture
Office of the Solicitor
Washington 25, D. C.

December 7, 1944.

Opinion for Lyle F. Watts
Chief, Forest Service

Dear Mr. Watts:

This is in reply to Mr. Kneipp's memorandum (U USES, R-9, Chippewa General) dated January 20, 1944, which requests my opinion as to the authority under which minerals may be developed on the approximately 193,000 acres of ceded and relin-

quished Indian reservation land set aside as a national forest under the act of May 23, 1908 (35 Stat. 271), and located in what is now known as the Chippewa National Forest, State of Minnesota. It is understood that your inquiry relates solely to the authority under which mineral resources may be developed generally for commercial purposes, and that you are not concerned with the exercise of possible emergency war powers for the development of certain strategic and critical minerals needed in the war effort.

Admittedly, no express authority has been given to the Secretary of Agriculture to permit the development of mineral resources on the lands under consideration. Mr. Kneipp states that Regulation U-13, as promulgated by the Secretary in 1942 for the development of mineral resources of lands acquired under the Weeks law, does not include the specific statutory reference to the act of May 23, 1908; that the State of Minnesota is not subject to the general mining laws, being specifically excluded from their operation by Revised Statute 2345; and that apparently disposal by the Secretary of the mineral resources on the concerned land would be authorized under his general power to regulate the use and occupancy of the national forests, in which case he could direct that all mineral resources on such lands thereafter should be subject to ultization only in conformity with Regulation U-13. You request my opinion as to the correctness of that assumption, or as to the proper means for authorizing mineral development on the concerned land.

It is my opinion that the Secretary of Agriculture is not authorized to dispose of the mineral resources of such lands under his general power to regulate the occupancy and use of the national forests. It is further my opinion that such lands are subject to the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181 et seq.), and that this act is the only existent authority under which any of the mineral resources of such lands may be developed. Under the Mineral Leasing Act, mineral deposits of coal, phosphate, sodium, potassium, oil, oil shale and gas are subject to disposition by the Secretary of the Interior.

The act of March 3, 1891 (26 Stat. 1095, 1103, 16 U.S.C. 471), authorized the President, from time to time, to set apart and reserve, in any State or Territory, public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public forest reservations. Pursuant to the authority granted by this act, the President set apart and reserved large areas of public lands in the West as national forests. The act, however, did not contain any provision for the administration of the reserved lands, and they were withdrawn entirely from appropriation under the mining and other public land laws. No grazing could be permitted on national forest lands, no timber could be cut or removed therefrom, and the mineral resources thereof could not be explored or developed. This worked a great hardship upon settlers within and outside of the boundaries of the forests, retarded development of the West and resulted in the pas-

sage of the act of June 4, 1897 (30 Stat. 11), which provided for the administration of the national forests and the exploration and development of the mineral resources of certain of the lands within their boundaries. Op. Sol. 1385 (O.S.); 29 Cong. Rec. pt. 3 (1897) pp. 2480-2522 (2512-2517), and 2676-2693 (2677-2680).

By the act of June 4, 1897 (30 Stat. 11, 35, 16 U.S.C. 475), the purposes of these reservations were declared to be "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

This act also provided that the management and regulation of these reserves should be by the Secretary of the Interior, but in 1905 that power was transferred to the Secretary of Agriculture (33 Stat. 628, 16 U.S.C. 472), and by virtue of these statutes he was authorized to "make provision for the protection against destruction by fire and depredations upon the public forests and national forests * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction * * *" (30 Stat. 11, 35, 16 U.S.C. 551.) (Underscoring supplied.)

The act of June 4, 1897 (30 Stat. 11, 36, 16 U.S.C. 482), further provided that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to

entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained." The act of February 1, 1905, supra, which transferred the general administration of forest reservations from the Secretary of the Interior to the Secretary of Agriculture, expressly retained in the Secretary of the Interior the execution of all laws affecting "the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." (16 U.S.C.A. § 472.)

Since the act of February 1, 1905, supra, retained in the Secretary of the Interior the execution of the provisions of the 1897 act expressly applicable to minerals, then, in the absence of other express authority, any powers which the Secretary of Agriculture might have to permit the development of mineral resources of the national forests would be limited to those which might be implied from his express authority to regululate the occupancy and use of the national forests.

It is well settled that public officers have not only the powers expressly conferred upon them by law, but also those which, by necessary implication, are requisite to enable them to discharge their duties. However, it is equally well settled that no powers will be implied except those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed.

27 Ops. Att'y Gen. 432 (1909); 36 id. 282 (1930); 37 id. 534 (1934); 38 id. 98 (1934).

The Constitution (Art. IV, sec. 3, cl. 2) commits to Congress the power "to dispose of and make all needful Rules and Regulations" respecting the property of the United States. It has uniformly been held that such provision confers on Congress exclusive jurisdiction to dispose of the land or other property of the United States. Such property cannot, therefore, be disposed of unless authorized by an act of Congress. This authority may be generally expressed, or may be specifically granted to permit the disposition in whole or in part of particular property rights. But until that power is given by Congress, expressly or impliedly, the executive is without power to act. 34 Ops. Att'y Gen. 320 (1924); 22 Comp. Gen. 563 (1942), and cases cited.

In its usual connection as interpreted by the courts the term "to dispose of" means "to alienate" or to "effectually transfer." United States v. Hacker, 73 Fed. 292 (S.D. Cal. 1896); Dayton Brass Castings Co. v. Gilligan, 267 Fed. 872 (S.D. Ohio 1920). The term has been held to include a lease and an easement which result in a diminishing of the interest, control or right of the owner in the property. Hill v. Sumner, 132 U. S. 118 (1889); Op. Sol. 4248.

It follows, then, that any attempt to alienate a part of the property, or, in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein without authority

from Congress is prohibited. Development of the mineral resources of the national forests involves an authorization to the developer to remove mineral deposits, and the passage of title to the minerals from the United States to the developer. Such action results in not only the occupancy and use but the alienation of a part of the lands and is a "disposal" of the property of the United States. 34 Ops. Att'y Gen. 320 (1924); Op. Sol. 264 (O.S.)

The Secretary of Agriculture has been granted broad powers to regulate the occupancy and use of the national forests and to preserve the forests thereon from destruction. He is limited in their exercise to the regulation of the occupancy and use of the national forests for the purposes for which the forests were established, to wit: "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States," and to preserve the forests thereon from destruction. United States v. Grimaud, 220 U. S. 506 (1911); Utah Power and Light Co. v. United States, 243 U. S. 389 (1917); 25 Ops. Att'y Gen. 470 (1905); 28 id. 522 (1910); 29 id. 303 (1912); 30 id. 263 (1914).

It is apparent from a review of the objects of the national forests that they can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of the mineral resources. Ops. Sol. 264 and 1866 (O.S.). Development of mineral re-

sources may be of benefit to the United States. However, the question is one of power, and that must come from Congress, and is not to be inferred from the fact that the proposed action would be highly beneficial to the United States. 20 Ops. Att'y Gen. 93 (1891).

Since development of the mineral resources of the national forests is not necessary to the accomplishment of the purposes for which the forests were established, or to their preservation, the Secretary of Agriculture does not have any implied authority to dispose of mineral resources as such action involves the exercise of a power beyond the scope of his general supervisory powers. Op. Sol. 264 and 1866 (O.S.).

In an opinion of this office dated October 20, 1931 (Op. Sol. 12920 (O.S.)), it was held that the authority conferred upon the Secretary of Agriculture to regulate the occupancy and use of the national forests was ample for the issuance of special use permits for the development of the mineral resources of certain national forest lands, which, by virtue of overlapping withdrawals, were not subject to mineral location under the mining laws, if the proposed mineral development would not interfere with the use of the lands for the purposes for which they had been withdrawn. No reasons were advanced for such conclusion, and for the reasons stated in this opinion and those stated in the opinions of the office dated March 9, 1915 (Op. Sol. 264 (O.S.)), and February 24, 1916 (Op. Sol. 1866 (O.S.)), that decision is hereby overruled.

In passing, the following provision of the act of June 4, 1897 (30 Stat. 11, 36), may appropriately be noted:

> "Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior [Agriculture]. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations." (Underscoring supplied.)

In an opinion of this office dated May 26, 1941, (Op. Sol. 3344), it was stated that "In our opinion, this provision was not intended to grant any right to prospect, locate and develop the mineral resources of the national forest lands. The act, of which it is a part, provides generally for the administration of national forests. It seems clear that the provision quoted was intended only to make certain that the act would not be construed to deny or in any way interfere with mining rights obtained under other laws." See also Op. Sol. 1385 (O. S.).

The Secretary of Agriculture promulgated Regulation U-13, dated September 9, 1942, (7 Fed. Reg. 7178, 7179), pursuant to the authority granted to him by the act of March 4, 1917 (39 Stat. 1134, 1150, 16 U.S.C. 520), which provides in part:

> "The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the act of March 1, 1911, (36 Stat. 961), known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States; * * *."

The authority granted the Secretary of Agriculture by this act is expressly limited to the mineral resources of lands acquired under the Weeks law. The land here involved was not acquired under the Weeks law, and no subsequent legislation has extended the purview of the 1917 act to these lands.

In this situation and in the absence of any implied authority to permit development of the mineral resources of national forests, the Secretary of Agriculture is not authorized to direct that the mineral resources of the concerned land are subject to utilization in conformity with Regulation U-13.

The concerned land, prior to being set aside as a national forest, was part of an Indian reservation established for the Pillager and Lake Winnebigoshish bands of Chippewa Indians. The Mississippi bands of Chippewa Indians, by the treaty of Feb-

ruary 22, 1855 (10 Stat. 1165), ceded, sold, and conveyed to the United States "all their right, title, and interest in, and to," the lands then owned and claimed by them, in the Territory of Minnesota. Out of the ceded lands there were then reserved and set apart particularly described tracts or reservations for the permanent homes of the Indians. By Executive orders dated November 4, 1873, and May 26, 1874, (Sen. Doc. No. 319, 58th Cong. 2d Sess. (1903-04), 851), the tract reserved for the use of the Pillager and Lake Winnebigoshish bands was enlarged, the orders providing that the additional lands therein embraced were "withdrawn from sale, entry, or other disposition," and were set apart for the use of the Indians. Some of the land under consideration was a part of the tract reserved for the use of the Pillager and Lake Winnebigoshish bands of Indians by the treaty of February 22, 1855, supra, and the balance was a part of the lands added to the original reservation by the aforementioned Executive orders.

Under the act of January 14, 1889, (25 Stat. 642), as amended by the acts of June 27, 1902, (32 Stat. 400), and May 23, 1908, (35 Stat. 268), provision was made for the complete cession and relinquishment by the Chippewa Indians of all their title and interest in and to all of the lands in their reservations, excepting the lands in two reservations not here involved, and Congress, in the last mentioned act, expressly set aside the concerned land as a national forest.

Under these circumstances, this land, prior to

being set aside as a national forest, was "Indian land." The fee of the land was in the United States, subject to a right of occupancy by the Chippewa tribe of Indians (Minnesota v. Hitchcock, 185 U. S. 373 (1902)). Upon the appropriation of this land by Congress as a national forest, the entire legal and beneficial title merged in the United States (Chippewa Indians v. United States, 305 U. S. 479 (1939)). The land thereupon had the same status as though it had been restored to the public domain and thereafter set aside as a national forest.

It is understood that in the administration of the Chippewa National Forest this land has been treated and administered as public domain forest land. Both land and timber in this forest have been exchanged, under the act of March 20, 1922 (42 Stat. 465, 16 U.S.C. 485, 486), with the approval of the Secretary of the Interior, for privately owned lands within the exterior boundaries of the forest.

The act of May 23, 1908, supra, which set this land aside as a national forest, does not contain any provision directly authorizing disposal of the mineral resources thereof. The act, however, does provide that "the national forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto." (Underscoring supplied.) The general laws governing the disposition of the mineral resources of public domain lands are the general mining laws of May 10, 1872, (17 Stat.

91, 30 U.S.C. 21 et seq.), and the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181 et seq.).

The general mining laws were expressly made applicable to public domain forest lands that were subject to entry under the existing mining laws by the act of June 4, 1897, supra, which provides for the administration of the national forests. The public domain forest land here involved is not subject to entry and location under the general mining laws, as the State of Minnesota has been excepted from the provisions thereof. Section 2345 of the Revised Statutes, passed in 1873 (17 Stat. 465, 30 U.S.C. 48), provides that the mineral lands situated in that State and in the States of Michigan and Wisconsin "are declared free and open to exploration and purchase according to legal subdivisions, in like manner as before the 10th day of May, 1872 * * * Such lands shall be offered for public sale in the same manner and at the same minimum price as other public lands." The purpose of the statute was to except the mineral lands in the named States from the mining laws enacted in the previous year and permit their disposal under the land laws. Deffeback v. Hawke, 115 U. S. 392 (1885). Accordingly, the general mining laws are not applicable to this particular public domain forest land.

The Mineral Leasing Act expressly declares that it is applicable to mineral deposits on lands "owned by the United States, including those in national forests," excepting lands acquired under the Weeks

law. The lands here involved are public domain forest lands and they are, accordingly, subject to this act. See 40 Ops. Att'y Gen. 63 (1943).

Additional reasoning for the applicability of the Mineral Leasing Act to these lands is set out in an opinion of this office dated November 1, 1944, (Op. Sol. 5066). In that opinion it was stated:

> "The language of the Mineral Leasing Act specifically including the lands in the national forests with the lone exclusion of those acquired under the Weeks Law is plain. It leaves no patent doubt as to the intent of Congress that the provisions of the Mineral Leasing Act were to apply to all of the national forest lands which Congress had theretofore authorized to be acquired and thus set apart as national forests other than those acquired under the Weeks Law, as well as those which the Congress had theretofore set apart and reserved or authorized to be set apart and reserved as national forests. If there should be any doubt as to such intention, it is completely dispelled by the legislative history of the Mineral Leasing Act."

Sincerely yours,

/s/ ROBERT H. SHIELDS,
Solicitor.

Dictator
WJMaxey :IP :MTH
11-24-44
F 01426

[Title of District Court and Cause.]

OPINION

Filed April 3, 1952

P. J. GILMORE,
U. S. District Attorney and

STANLEY D. BASKIN,
Assistant U. S. District Attorney,
For Plaintiff.

W. C. STUMP and
DONALD McL. DAVIDSON,
Attorneys for Defendant.

This controversy involves the validity of the defendant's location, under the mining laws, of a sand and gravel claim on June 21, 1951, upon a part of a tract of 37.5 acres of land on Whipple Creek in the Tongass National Forest, Alaska, which, on February 9, 1951, had been reserved by the Regional Forester for the use of the Bureau of Public Roads as a source of road building material, and on July 26, 1951, withdrawn from entry by the Secretary of the Interior, Public Land Order No. 734, 16 F.R. 7329. This tract is embraced within the exterior boundaries of a tract comprising 91.13 acres, which on September 11, 1940, was set aside as a public recreation site under 16 U.S.C.A. 497 and the regulations made thereunder.

It appears that the plaintiff has used a part of the tract bordering on Whipple Creek as a source

of gravel and sand since 1934 in connection with the construction and maintenance of forest highways, roads and trails; that it is now engaged in highway construction in the vicinity; that this is the only economically feasible source of road building material, and that as it is removed it is replenished by freshets. It further appears that the extent and character of the deposit of sand and gravel were ascertained only after considerable exploratory work, involving the construction of an access road 1400 ft. in length, the sinking of shafts, removal of the overburden of trees, brush, windfalls and soil, which, in conjunction with the removal of sand and gravel, has resulted in a gravel pit of about 3 acres in area. A ramp, constructed in the pit to facilitate the loading of trucks, appears to be the only improvement worthy of note.

Upon making his location, defendant barricaded the access road and excluded the plaintiff from the pit.

Plaintiff contends that the location is invalid because there was no discovery of mineral; that the land was not open to entry or location under the mining laws; that sand and gravel are not minerals within the purview of the mining laws; that the location was made by the defendant in bad faith for the purpose of appropriating the benefits of plaintiff's exploration, development and improvements, after learning of the highway construction program now in process of execution and that the invitation for bids for this construction specified the use of Whipple Creek gravel. Plaintiff further

contends that the local statutory requirements governing the location and staking of mineral claims were not complied with in several particulars, and seeks injunctive and other relief.

The defendant, while admitting that the several administrative steps testified to have been taken, denies that they were of any effect so far as precluding entry and location under the mining laws, except the withdrawal order of July 26, 1951, which he contends came too late to affect the validity of his location.

From the uncontroverted facts in evidence, it is clear that the area embracing the pit and improvements could not lawfully be included in a mineral location even in absence of any withdrawal of the area. It was in the actual possession and use of the plaintiff. That such use was intermittent and, in some cases, through the instrumentality of its contractors, if of no importance. It was used to the extent required by the plaintiff in the discharge of its function of administering the Tongass National Forest, with special reference to the construction of highways, roads and trails. Not only was this use a matter of common knowledge, but the pit itself and the character of the improvements were such as to put any person on notice that it was in the actual use of another. Regardless of what more, if anything, might be required to be shown in support of the claim of a private individual, it must not be overlooked that the United States, as absolute owner of the land, is not required to show more than that its use has been commensurate with its

obligations in the execution of its functions. When the defendant included the gravel pit in his location, the land was in the actual use and possession of the United States, which had made valuable and permanent improvements thereon and in connection therewith. Since it is well settled that even as between private individuals no right can be initiated to land in the actual possession of another, a fortiori, no such right can be initiated as against the owner in actual possession. Carr v. United States, 98 U. S. 433; Ritter v. Lynch, 123 Fed. 930, 933-5; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4; aff. 190 U. S. 301; Lyle v. Patterson, 228 U. S. 211. Although the foregoing cases did not involve national forest lands, this distinction is not material here. By analogy it may logically be said that since the United States had already made an appropriation of the sand and gravel of Whipple Creek, the pit was not open to relocation by the defendant or any other person even in the absence of a special use permit or an order setting it aside. Gavigan v. Crary, 2 Alaska 370, 380; 5 L.D. 376.

So much for the gravel pit and access road, as distinguished from the remainder of the 37.5 acre tract over which the defendant's claim overlaps. Turning now to a consideration of the question as to the effect of the withdrawal of this tract, it is noted that the plaintiff relies principally on the special use permit issued February 9, 1951, by the Regional Forester to the Bureau of Public Roads, pursuant to Secs. 251.1 and 251.2, 36 C.F.R., which regulations were in turn promulgated under 48

U.S.C.A. 341 and 23 U.S.C.A. 18, the latter of which authorizes the appropriation of any part of the public lands or reservations of the United States as a source of material for the construction or maintenance of forest roads and highways.

48 U.S.C.A. 341 provides that:

> "The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for purposes of residence, recreation, public convenience, education, industry, agriculture, and commence, not incompatible with the best use and management of the national forests, for such periods as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws:"

Under the authority conferred thereby, the Secretary of Agriculture, by regulation, 36 C.F.R. 255, Secs. 251.1(b) and 251.2, authorized the issuance of special use permits by the Regional Forester upon delegation of such authority to him by the Chief Forester. Such delegation was proved, plaintiff's exhibit No. 2, and was exercised by the Regional Forester in issuing the special use permit of February 9, 1951, which, omitting the description provides that:

> "The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building material:"

This would appear to be sufficient, since such order need not be couched in any particular phraseology. U. S. v. Payne, 8 Fed. 883, 888, Wolsey v. Chapman, 101 U. S. 755, 770. Moreover, it does not appear that it is essential that such withdrawal be made a matter of public record even though the area withdrawn is a part of the public domain, as distinguished from a forest reservation, although it appears that it has been the practice to note such withdrawals of public lands on the records of the local and general land offices, apparently out of caution in anticipation of the extension of public land surveys to such areas. In this instance it appears that the withdrawal of February 9, 1951, was made a matter of record in the offices of the United States Forest Service in Juneau and Ketchikan and that such records were open to inspection by the public generally. I am of the opinion that this was a valid withdrawal and that thereafter the land was no longer open to entry or location under the mining laws.

Defendant concedes that the order of the Secretary of the Interior of July 26, 1951, 16 F.R. 7329, would be effective if it had antedated defendant's

location. The contention that it came to late to affect defendant's location, however, overlooks the doctrine of relation back. The case here under consideration is one in which there are two claimants to the same sand and gravel deposit, one of whom has attempted to appropriate it by a location made on June 21, 1951, under the mining laws, while the other between February 9 and March 8, 1951, requested its withdrawal for the use of the Bureau of Public Roads. This designation in itself would, in conjunction with concurrent use, appear to be a sufficient appropriation to segregate the area from the national forest land. At any rate, it would appear by analogy that the plaintiff acquired an inceptive right to the area for the purpose specified in the request for the withdrawal before the defendant acquired any right by virtue of his location. It is a well settled rule of law that the first in time is the first in right and hence, when the Secretary of the Interior withdrew the area on July 26, 1951, assuming his authority extends to the withdrawal of national forest lands, the United States became entitled to the exclusive use and possession of the tract and this right, under the doctrine referred to, related back to the time of the request of the Regional Forester, Knapp v. Alexander, 237 U. S. 1, and cut off all intervening rights including any rights acquired by the defendant by virtue of his location.

From the foregoing, I conclude that there was an appropriation and withdrawal of this tract from entry and location under the mining laws, not only

by actual use and occupation so far as the area embracing the pit and access road is concerned, but also by the formal act of the Regional Forester and that, therefore, the defendant's claim is invalid. U. S. v. Hammer, decided by the Register of the United States Land Office at Anchorage, Alaska, Contest No. 442, January 16, 1941, affirmed by the Commissioner of the General Land Office, May 6, 1941. Wilcox v. Jackson, 13 Pet. 498; Lyders v. Ickes, 84 Fed. (2) 232; Gavigan v. Crary, 2 Alaska 370; United States v. Mobley, 45 Fed. Supp. 407, 46 Fed. Supp. 676.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed April 3, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE DECISION OF THE COURT AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendant H. F. Schaub moves for judgment dismissing the complaint and dissolving the restraining order heretofore issued herein notwithstanding the decision of the court of April 3, 1952, and, in the alternative and without waiving either of said motions, moves for a new trial upon the following grounds:

1. Correction Memorandum No. 11, issued February 9, 1951, is not a permit within the meaning of 48 U.S.C.A. § 341, in that:

(a) It was not issued for purposes of residence, recreation, public convenience, education, industry, agriculture and commerce;

(b) It was not in form a special use permit, nor designated such as required by regulations of the Secretary of Agriculture;

(c) It was not issued pursuant to the procedure prescribed by the Secretary of Agriculture, nor did it include the stipulation required for such permits for special uses; and

(d) It was not intended as a permit under 48 U.S.C.A. § 341, in that the plaintiff believed both before and after its issuance and up to a date subsequent to the trial that such memorandum did not withdraw the tract from the operation of the mineral leasing law, and plaintiff did not intend to withdraw such tract from the operation of the mineral leasing law by such memorandum, whereas a permit under 16 U.S.C.A. § 341 would have withdrawn the tract from the operation of such law.

2. The court erred in excluding from evidence a letter dated February 7, 1951, by the Forest Service, and in excluding from evidence certain other letters from the Bureau of Public Roads, Department of Commerce, which letters show that Correction Memorandum No. 11 was not a permit under 48 U.S.C.A. § 341, but was an administrative step within the Regional Forester's office taken in con-

nection with the procedure for withdrawing the tract prescribed by 43 U.S.C.A. § 141 and Executive Order 9337.

3. The court erred in excluding from evidence U. S. Forest Circular U-220, which further demonstrated that Correction Memorandum No. 11 and all other actions of the plaintiff were pursuant to 43 U.S.C.A. § 141 and Executive Order 9337 and were not pursuant to 48 U.S.C.A. § 341.

4. There was no evidence that Correction Memorandum No. 11 was ever filed in any public record, or when it was filed in the Office of the United States Forest Service, or that such records are public records.

5. There was no evidence that the 37.5 acre tract, or any part of it, was in the actual possession of plaintiff, or any of its officers or agents, and the evidence was uncontroverted that no one had done any work upon the premises or extracted any gravel therefrom for more than six (6) months prior to defendant's mineral location.

6. The court erred in holding that the order of the Secretary of the Interior of July 26, 1951, related back to Correction Memorandum No. 11 of February 9, 1951, to make the latter a valid and effective withdrawal as of that date because (a) the order of the Secretary of the Interior did not include all of the tract described in Correction Memorandum No. 11, and (b) the order of the Secretary of the Interior expressly makes the tract subject

to the mineral leasing laws, and the Secretary of the Interior has no power to so modify or change a permit issued pursuant to 48 U.S.C.A. § 341.

7. That the court erred in the law in holding that the Secretary's order of July 25, 1951, related back to February 9, 1951; and in holding that rights in land may not be initiated in lands occupied by others; and in holding that the Secretary of the Agriculture has any power to authorize mining in national forests by permit or otherwise; and in holding that the Secretary of Agriculture may delegate his power to issue permits under 48 U.S.C.A. § 341.

Wherefore, defendant submits this motion upon all the papers and proceedings herein and the memorandum filed herewith and prays the court to consider the same without oral argument or if the court desires oral argument that a date be set for the same and further prays for judgment notwithstanding the written decision of the court of April 3, 1952, or in the alternative, for a new trial.

/s/ WILFRED STUMP,

/s/ DONALD McLELLAN DAVIDSON,

Attorneys for Defendant.

[Endorsed]: Filed April 12, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Action by the United States of America against H. F. Schaub, for a permanent injunction.

This cause having been tried by the Court without a jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

I. That the defendant, H. F. Schaub, is a resident of Division Number One of the United States District Court, Ketchikan, Alaska.

II. That the 37.5 acres herein in dispute is, and at all times herein mentioned, was part of the Tongass National Forest, Revillagigedo Island, Alaska, located on or about Whipple Creek, 11.5 miles north of the City of Ketchikan, and more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6 on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less.

That defendant's specific claim is as follows:

From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less.

That a portion of said claim is within 37.5 acres.

III. That said land is, and at all times herein mentioned has been, included within the boundaries of the Tongass National Forest and under the jurisdiction and administration of the Secretary of Agriculture as part of a National Forest.

IV. That on June 21, 1951, the defendant located a mining claim for sand and gravel, a portion of which is within said 37.5 acres, which mining claim is known as the "Whipple Creek Number 1 Placer Claim," and notice of which location was recorded on the 27th day of June, 1951, at 10:40 a.m. in Volume "14" of mining records at P. 29 of said records at the Ketchikan office wherein said claims are recorded. That defendant, H. F. Schaub, located such claim openly and peaceably.

V. That since 1934 plaintiff has used part of the

tract bordering Whipple Creek as a source of sand and gravel in connection with the construction and maintenance of forest highways, roads and trails. Said use is more particularly described as follows:

(1) Construction of an access road approximately 1,200 feet in length by contractors working under, by and for the Bureau of Public Roads in 1949 and 1950.

(2) Sinking of numerous testing shafts throughout the 37.5 acre tract in June, 1950, by the Bureau of Public Roads.

(3) Removal of the overburden of trees, brush, windfalls and soil covering about a 3-acre area in and along the stream bed of Whipple Creek by contractors working by and for the Bureau of Public Roads and Forest Service at various times from 1934 up to December, 1950.

(4) Construction of a log ramp by a contractor working by and for the Bureau of Public Roads and Forest Service in 1949.

VI. That on February 9, 1951, the Regional Forester approved and issued to the Bureau of Public Roads Correction Memorandum No. 11, which described said 37.5 acres and provided:

> "The area of 37.5 acres immediately above the Whipple Creek Bridge taking in both banks of Whipple Creek described below and as shown on plat furnished by the Bureau of Public Roads is hereby reserved for the use of the Bureau of Public Roads as a source of road building materials."

VII. That Correction Memorandum No. 11 was a special use permit of the Regional Forester issued by virtue of authority delegated to him by the Secretary of Agriculture of the United States, (given to Secretary of Commerce by 1949 Reorganization Plan No. 7 Notes under 23 U.S.C.A. 2, and Reorganization Plan No. 5, paragraphs 1, 2, effective May 24, 1950, set out under 5 U.S.C.A. 591) under the provisions of the Act of March 30, 1948, 48 U.S.C.A. 341, and Act of November 9, 1921, 23 U.S.C.A. 18 and pursuant to regulations promulgated thereunder by the said Secretary of Agriculture, Sections 251.1 and 251.2, 36 C.F.R.

VIII. That said special use permit by its terms reserved and set aside the said 37.5-acre tract hereinabove described, for the use of the Bureau of Public Roads as a source of road building materials.

IX. That the United States Forest Service between February 9 and March 8, 1951, requested the Secretary of the Interior by formal request in writing to withdraw the 37.5-acre tract from all forms of location and entry under the public land and mining laws and from leasing under the mineral leasing act except for oil and gas deposits, providing no part of the surface of the lands shall be used in connection with prospecting, mining and removal of oil and gas.

X. That the Secretary of the Interior withdrew the 37.5-acre tract described below from all forms of entry under the public land laws including the mining laws, but not including the mineral leasing

laws, by Public Land Order 734, dated July 20, 1951, and published July 26, 1951, in the Federal Register, Volume Number 16, page 7329:

Beginning at a point on the southeast boundary of U. S. Survey No. 2802 from which corner No. 1 of said survey bears N. 30° E., 220 feet, thence by metes and bounds:

N. 30° 00′ E., 817.0 feet to corner No. 6 of U. S. S. 2803; No. 46° 30′ E., 860.0 feet; S. 43° 30′ E., 1,080.0 feet; S. 46° 30′ W., 1,160.0 feet; S. 83° 57′ W., 548.0 feet to PC 566 + 57.4 on southeast edge of the right-of-way of North Tongass Highway; Southerly and westerly, 353.0 feet parallel to and 33 feet from the center line of North Tongass Highway; N. 12° 00′ W., 437.0 feet to point of beginning.

XI. That said defendant, H. F. Schaub, without permission from plaintiff or said Regional Forester, and under claim of right so to do by virute of the mining claim mentioned in Finding IV above, has taken possession of said land and premises and has erected barricades across right of way built by plaintiff for ingress and egress to and upon the land herein in dispute; moved a trailer house upon said land; removed timber and overburden; mined and removed sand and gravel; further dug, excavated and interfered with the occupancy and use of said land by the Forest Service and the Bureau of Public Roads, its officers, agents, employees and contractors, who thereto are the persons authorized by said Regional Forester under

said special use permit. That said defendant threatens to dig, excavate and interfere, unless enjoined therefrom by order of this Court, and that plaintiff has no plain, speedy or adequate remedy at law for said acts and conduct on the part of the defendant, and unless said acts and conduct are enjoined, plaintiff will suffer irreparable injuries.

XII. That no proof was offered or received upon the trial of this case that the issues herein involved had ever been introduced in or presented to the United States Department of Agriculture or the Secretary of Agriculture of the United States under any rules or regulations promulgated by said Secretary of Agriculture.

XIII. That the complaint in this action was filed at the request of the Regional Forester, and upon the direction of the Attorney General.

Conclusions of Law

I. That possession of and title to the above-described 37.5-acre tract is in the Plaintiff, United States of America, which is entitled to the exclusive possession thereof as against the defendant.

II. That there was an appropriation and withdrawal of the road and three-acre area included within the 37.5 acres, from entry and location under the mining laws by actual use and possession as more particularly described in Finding V supra.

III. That the land herein in dispute was, by issuance of the above-mentioned special use permit

on February 9, 1951, definitely and conclusively appropriated and set aside for a particular purpose, authorized by the said act of March 30, 1948, 48 U.S.C.A. 341, and said act of November 9, 1921, 23 U.S.C.A. 18, and pursuant to regulations promulgated by the Secretary of Agriculture Sections 251.1 and 251.2 36 C.F.R., and said lands, for that reason, were and are not subject to subsequent location under the mining laws of the United States of America and of the Territory of Alaska, or either of them, while said permit remains in force and effect.

IV. That Public Land Order 734, issued by the Secretary of Interior on July 20, 1951, published on July 26, 1951, in the Federal Register, Volume Number 16, page 7329, related back to said formal written request for withdrawal by the Forest Service to said Secretary of Interior between February 9 and March 8, 1951, and conclusively and effectively withdrew and appropriated said land in dispute from any and all forms of mineral entry as of February 9, 1951, even though the defendant made his said mineral entry on or about June 21, 1951.

V. That said defendant, H. F. Schaub, his servants, agents or employees has no right, title, estate, claim, lien, or interest of whatsoever kind or nature, in or to any part of said 37.5-acre tract and that the plaintiff is entitled to a decree restoring exclusive possession thereof to the plaintiff and persons authorized by it.

VI. That the plaintiff is entitled to a writ of permanent injunction, permanently enjoining the defendant from removing sand and gravel from the 37.5-acre tract described in Finding II and requiring defendant to remove any and all barricades and property put on said 37.5-acre tract, and from interfering in any way with the occupancy and use of said 37.5-acre tract by persons or companies authorized by plaintiff and from asserting any claim or interest whatsoever arising out of or by virtue of said "Whipple Creek Number 1 Placer Claim" in or to said 37.5-acre tract, or any part thereof, adverse to plaintiff and persons or companies authorized by plaintiff, all without prejudice to defendant's rights, if any, in any land outside of said 37.5-acre tract.

Dated at Juneau, Alaska, this 17th day of May, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 17, 1952.

In the District Court for the Territory of Alaska
Division Number One at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

H. F. SCHAUB,
Defendant.

JUDGMENT

The above-entitled and numbered cause having been heard on the 25, 26, and 28th days of January, 1952, and all parties thereto having appeared by counsel, and the Court having heard the pleadings, the evidence, and arguments of counsel for both parties having been heard by the Court and briefs having been filed by both parties, the Court having given due consideration thereto, and findings of fact and conclusions of law having been made by the Court, entered herein and made a part hereof, and it appearing to the Court that the plaintiff should be granted the relief prayed for in its complaint, it is therefore on this the ninth day of April, A.D. 1952:

Ordered, Decreed and Adjudged, that the preliminary injunction heretofore granted and issued by this Court herein on the 15th day of October, 1951, and entered in the office of the Clerk of this Court on the 15th day of October, 1951, be and the same hereby is made perpetual and permanent and that the defendant, H. F. Schaub, his servants,

agents and employees be permanently and perpetually enjoined and restrained from:

1. Barricading plaintiff's right-of-way to, on and from the 37.5 acres of land more particularly described as follows:

> Beginning at Corner No. 1 (identical to Corner No. 1 of U. S. Survey 2803), thence N. 30 deg. E. 498.96 ft. to Corner No. 2 (identical to Corner No. 6 of U. S. Survey 2803), thence No. 46 deg. 30′ E. 860 ft. to Corner No. 3; thence S. 43 deg. 30′ E. 1080 ft. to Corner No. 4; thence S. 46 deg. 30′ W. 1160 ft. to Corner No. 5; thence S. 83 deg. 57′ W. 548 ft. to Corner No. 6, on the edge of Tongass Highway right-of-way at P. C. 566 57.4; thence following edge of said right-of-way to Corner No. 1, containing 37.5 acres, more or less,

using and occuping said land; mining and removing sand, gravel and stone from said land; interfering with the plaintiff, its departments, agencies, officers, servants, agents, employees, and contractors in using and occupying said land, in mining and removing sand, gravel and stone from said land.

2. That defendant be and is hereby required to remove from said 37.5 acres of land the trailer house and any and all other property and equipment belonging to defendant.

3. That defendant be and is hereby required to remove any and all barricades and obstructions which he has placed upon the said 37.5 acres of

land and the right-of-way to, on and from said land.

4. That defendant's claim of right, title and interest in and to his mining claim entitled "Whipple Creek No. 1 Placer Claim," within the said 37.5 acres of land, said mining claim more particularly described as follows:

> From Corner No. 1, U. S. Survey 2803, Revillagigedo Island, First Judicial Division, Territory of Alaska, go southeasterly 300.0 feet, more or less, to Post No. 4, which is the point of beginning; thence North 58° 15′ East 1318.0 feet to Post No. 5; thence South 13° 22′ East 143.58 feet to Discover Post No. 1; thence South 7° 15′ East 510.91 feet to Post No. 2; thence South 60° 24′ West 1,136.14 to Post No. 3; thence North 24° 48′ West 565.44 feet to Post No. 4, the point of beginning. Said area contains 17.54 acres, more or less, be and is hereby

declared null and void insofar as his claim of right, title and interest therein embraces or constitutes a part of the said 37.5 acres of land.

It Is Further Ordered, Adjudged and Decreed that the defendant, H. F. Schaub, pay the cost of these proceedings to be taxed by the Clerk of this Court and that execution be issued for the same.

And that the Court grant such other and further relief as to it may seem just.

Done in open court this 17th day of May, 1952.

/s/ GEORGE W. FOLTA,
District Judge.

Not approved.

Two copies received this 11th day of April, 1952.

/s/ W. C. STUMP,
Of Attorneys for Defendant.

[Endorsed]: Filed May 17, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that H. F. Schaub, defendant in the above action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 17, 1952.

/s/ WILFRED C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

BOND FOR STIPULATION FOR COSTS

Whereas, a complaint was filed in this Court by the United States of America against H. F. Schaub for the reasons and causes in the said complaint mentioned; and the said H. F. Schaub, defendant, and General Casualty Company of America, Surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the Defendant or its Surety, execution may issue against their goods, chattels and lands for the sum of Two Hundred Fifty and No/100 ($250.00) Dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulator, undersigned, shall be and is bound in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that the Defendant above named shall pay all such costs as shall be awarded against it by this Court.

Dated this 18th day of June, 1952.

/s/ H. F. SCHAUB.

[Seal] GENERAL CASUALTY COMPANY OF AMERICA,

By /s/ DOUGLAS S. BROWN, Attorney-in-Fact.

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: P. J. Gilmore, Jr., and Stanley D. Baskin, attorneys for plaintiff:

Sirs:

Please Take Notice that the annexed motion for an order directing the transmittal of exhibits offered in evidence by defendant and refused, as part of the record on appeal, will be submitted to the above court forthwith upon all of the papers and proceedings herein and motion and memorandum hereto annexed and without oral argument unless the court orders otherwise.

/s/ W. C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

MOTION FOR AN ORDER DIRECTING TRANSMITTAL OF EXHIBITS OFFERED AND REFUSED AS PART OF RECORD ON APPEAL

Defendant, H. F. Schaub, upon all of the papers and proceedings herein, hereby moves for an order directing the transmittal of the following described exhibits offered in evidence by defendant upon the

trial of this action and refused admission as part of the record on appeal:

1. That certain letter or memorandum dated February 7, 1951, by Frank Heintzleman to the Chief, U. S. Forest Service, Washington, D. C., with the attachments thereto, a copy of which exhibit is annexed hereto, marked "Exhibit A" and made part hereof.

2. United States Department of Agriculture, Forest Service, Circular No. U-220, dated December 16, 1949, entitled "U Classification, Withdrawals, Executive Order 9337, Recreation Areas (Administrative Sites)," a copy of which exhibit is annexed hereto, marked "Exhibit B," and made part hereof.

3. Reg. U-1, U-2 and U-3 appearing at pages NF-G3 (1) to NF-G3 (5), U. S. Forest Service Manual, a copy of which exhibit is annexed hereto, marked "Exhibit C," and made part hereof.

The grounds for this motion are as follows:

1. Each of the exhibits was offered and identified at the trial. No objection was made to their authenticity or competency. They were denied admission upon the grounds of irrelevancy, although their materiality was pointed out at that time. Defendant's offer of the exhibits for identification was also refused.

2. The decision of the court dated April 3, 1952, states that there was a withdrawal of the land from mineral entry on February 9, 1951, by a certain

document entitled and upon trial designated as Correction Memorandum No. 11 and referred to in the court's opinion as a special use permit. It was defendant's position that this document was merely an administrative step or record leading up to a withdrawal of the land from mineral entry by the Secretary of the Interior. Exhibit A, the first part of which is dated two days prior and its attachments dated four days subsequent to Correction Memorandum No. 11, shows conclusively that the Forest Service was at that time pursuing the procedure of withdrawal by the Secretary of the Interior. Exhibit B shows conclusively that the procedure followed is inconsistent with a withdrawal under any other authority.

3. The decision of the court further states that the Secretary of the Interior withdrew the area on July 26, 1951, and that this withdrawal was effective as of February 9, 1951, under "the doctrine of relation back." Not only does Executive Order 9337, granting the power to the Secretary of the Interior, expressly state that such orders are not effective until published in the Federal Register, but also the Forest Service Regulations set out in Exhibit C provide:

> "Public land order withdrawals are made by the Secretary of the Interior under the provisions of Executive Order No. 9337 with the recommendation of the Secretary of Agriculture. They must be cleared through the Budget Bureau and Attorney General's office

> and are not effective until published in the Federal Register." (Underlining added.)

Applying "the doctrine of relation back" to such orders overlooks both the express terms of their underlying authority and the interpretation placed upon them by the plaintiff. That doctrine would simply make such orders effective at some time antedating publication in the Federal Register contrary to the law and practice governing such orders.

Exhibit C also shows that Correction Memorandum No. 11 was only an administrative step leading to a withdrawal by the Secretary of the Interior and not a special use permit. It further discloses the requirements as to posting necessary in connection with a special use permit. Plaintiff offered no evidence at the trial that there was compliance with these posting requirements.

4. These exhibits, having been relevant and material to the issues in the case and having been refused admission on no ground other than being immaterial or irrelevant, should be made part of the record on appeal so that the appellate court may review all of the evidence offered at the trial of the action.

Wherefore, defendant submits this motion upon all the papers and proceedings herein and prays the court to consider the same without oral argument, or if the court desires oral argument that a date be set for the same, and further prays that the court enter an order directing that Exhibits A, B, and C annexed hereto, or copies thereof, ex-

hibits offered in evidence by defendant upon the trial of this action and refused admission, be transmitted as part of the record on appeal.

Respectfully submitted,

/s/ W. C. STUMP,

/s/ DONALD McL. DAVIDSON,
Attorneys for Defendant.

EXHIBIT A

Forest Service, Juneau, Alaska

February 7, 1951.

Chief, U. S. Forest Service, Washington, D. C.,
B. Frank Heintzleman, Regional Forester,
By: Chas. G. Burdick, Acting.
U-Classification, R-10, Alaska, Withdrawals, E. O. 9337, Public Service, Area, Whipple Creek, Tongass (S).

Attached material pertains to the withdrawal of a public service area at Whipple Creek, near Ketchikan, Alaska, in accordance with the procedure outlined in Circular U-220 and supplement. Two prints of a plat of the area attached.

This area has become extremely important as the only economical source of road building material adjacent to North Tongass Highway. The Bureau of Public Roads will need much of the gravel from this source in their construction program on the highway and they are very anxious to have this supply protected against unscrupulous mineral claimants.

Please make every effort to have this area withdrawn at an early date.

Attachments
KMarshall:edy
cc: sent Southern

2/13/51.

U
Classification, R-10, Alaska
Withdrawals, E. O. 9337
Public Service Area
Whipple Creek, Tongass (S)

Director,
Bureau of Land Management,
Department of the Interior,
Washington, D. C.

Dear Mr. Clawson:

It has been determined that the following described area is needed as a Public Service area and it is recommended that you withdraw this area, subject to existing valid claims, from all forms of location and entry under the public land laws, including the U. S. Mining Laws, and except as herein provided, from leasing under the Mineral Leasing Act, in accordance with the authority vested in you by Executive Order No. 9337 of April 24, 1943, for the purpose of maintaining a public gravel deposit.

The said lands shall be subject to leasing under the mineral leasing laws for their oil and gas deposits, providing that no part of the surface of the lands shall be used in connection with prospecting, mining and removal of the oil and gas.

Whipple Creek Public Service Site
Tongass National Forest, Alaska

Description

Beginning at a point on the southeast boundary of U. S. Survey No. 2802 whence Corner No. 1 of U. S. Survey No. 2802 bears N. 30″ E., 220 feet, thence: N. 30″ E. 817 feet to Corner No. 6 of U. S. Survey No. 2803, thence: N. 46″ 30′ E. 860 feet; thence: S. 43″ 30′ E. 1080 feet, thence: S. 46″ 30′ E., 1160 feet, thence: S. 83″ 57′ W., 548 feet to PC + 57.4 on the S. E. edge of the right-of-way of the North Tongass Highway, thence: paralleling the center line of North Tongass Highway and 33 feet from the center line thereof in a southerly and westerly direction 353 feet, thence: N. 12″ W. 437 feet to point of beginning containing 37.5 acres, more or less.

2—Director, Bureau of Land Management.

The consent of the Department of Agriculture to this withdrawal is hereby given in accordance with a delegation of authority signed by Secretary of Agriculture Charles F. Brannan on December 16, 1949 (14 Fed. Reg. 7674).

Very sincerely yours,

LYLE F. WATTS,
Chief.

By /s/ C. M. GRANGER.

KMarshall :edy
cc: sent WO (4)
Southern 1

EXHIBIT B

5371

United States Department of Agriculture
Forest Service

Washington 25, D. C.

Address Reply to
Chief, Forest Service, and Refer to
U Classification
Withdrawals, Executive Order 9337
Recreation Areas (Administrative Sites)

December 16, 1949.

Circular No. U-220

Regional Foresters
and Director, Tropical Region

Dear Sir:

After study here and consultation with the Bureau of Land Management and the Solicitor's office, it has been decided that we should request the Bureau of Land Management to withdraw national forest administrative sites, public service areas, and other areas needed for public use under the provisions of Executive Order No. 9337 of April 24, 1943, in order to give these areas protection against subsequent mineral location.

The Solicitor of this Department believes that developed administrative sites and public service areas are protected against location and entry under the U. S. Mining Laws but is very doubtful whether buffer zones around such areas or potential but undeveloped areas are protected. The Bureau of Land Management has some doubts as to whether even a

developed area can be protected from mining claims unless withdrawn under Executive Order No. 9337 or by legislation. A recent court case in Oregon, which we lost, shows that the courts will uphold a valid mining claim which was located outside of, but right next to a developed recreation area. The judge would not recognize that the mining development interfered with the recreation use of the area, even though it was in plain sight of a camp spot.

Classification under Reg. U-3 (b) is undoubtedly useful, but there is considerable question as to whether it will stand a severe test, particularly if the area is undeveloped.

Withdrawal by the Bureau of Land Management under Executive Order No. 9337 gives unquestionable protection and it therefore seems unwise for us to rely on less assured methods to protect our administrative and public service sites.

Withdrawal under Executive Order No. 9337 will be desirable for administrative sites and public service areas on all national forest lands which are subject to location and entry under the U. S. Mining Laws. It will not be necessary or desirable on lands acquired under the Weeks law, lands subject to the provisions of the Weeks law, or other lands which for any reason are not subject to location and entry under the mining laws.

Regions should give priority to important administrative sites and public service areas which are in mineralized zones. Priority should also be given to important potential areas which are not yet

developed, since such areas are more vulnerable to adverse location than developed areas.

This procedure will replace the present classification procedure under Reg. U-3 (b). Areas already classified under Reg. U-3 (b) should be reported for withdrawal but might be placed in a lower priority than unclassified areas since the former already have some protection. On the other hands, since you have already classified your most important areas under U-3 (b), it would be well to reconsider each one as to priority, regardless of whether or not already classified.

Regions are requested to prepare requests for withdrawals for administrative sites and other areas as rapidly as other work permits. For the present, your requests should be sent to this office for transmittal to the Bureau of Land Management. Later on it may be desirable to send requests direct to the managers of the local District Land Offices.

For the present withdrawals will be requested only for areas used or to be used by the United States for governmental purposes or for public use.

Roadside zones are a borderline case. You are requested to study important roadside zones and if a withdrawal seems in the public interest, a request for withdrawal should be made, giving reasons why it is necessary and desirable. Description of the zone would probably have to be by reference to the center line of the highway survey, but description by legal subdivision would be preferable if it is practicable.

No attempt will be made to include special use

areas, but resorts or summer home groups which are within a large recreation area and are an integral part of that area may be included in the withdrawal of the recreation area.

Waterfront zones along lakes and streams of high recreation value which are needed for public use should be withdrawn, description should be by legal subdivision if possible; otherwise by metes and bounds.

The handling of a sizable recreation area such as Pinecrest, Priest Lake, Cottonwood, North Fork Shoshone, O'dell Lake, or Sandia Crest presents a problem. Such areas are primarily valuable for public recreation use and yet all of the area will not be actually needed. We are inclined to err on the side of including too much rather than to report on several separate tracts within the one recreation area. Good judgment is required here to save work and yet not overstep the bounds of propriety.

Withdrawals should be requested for the following types of areas:

1. Administrative sites—ranger stations, lookouts, guard stations, horse pastures, nurseries, warehouses, etc.

2. Public Service areas—camp and picnic areas, winter sports areas, organization camps, etc.

3. Other Areas—those which require protection for public use or government use, such as roadside and waterfront zones.

Areas needed for future development, as well as areas already developed, should be reported, but we must be reasonable and limit requests for with-

drawal of potential areas to those for which there is a foreseeable future need. The same principle applies to areas needed for expansion of existing areas.

A reasonable buffer zone should be included around the actually needed area, whenever this is necessary to protect the use to be made of the area.

Description of the area should, whenever possible, be by legal subdivision, generally to the nearest 10-acre tract in sections covered by General Land Office survey. In unsurveyed areas the approximate legal description as nearly as can be determined will be satisfactory. Metes and bounds descriptions may be used in unsurveyed sections but they must be tied to established corners, U. S. monuments, or easily recognizable landmarks. Two copies of a map must accompany requests for withdrawals described by metes and bounds survey.

It will not be necessary to justify the withdrawal by a report or to give a word description of the area and its use. The Bureau of Land Management will accept our statement that the area is needed for governmental or public use. The name of the area, the forest, the state and the legal description are all that is needed to support our recommendation for withdrawal.

The request to the Bureau of Land Management will accept our statement that the area is needed for form, including four extra thin white copies. One letter may be used to request withdrawal of several areas of the same type, but the withdrawal of administrative sites and public service areas should not be requested in the same letter.

Director,
Bureau of Land Management.

Dear Mr. Clawson:

It has been determined by the Forest Service that the following described area is needed as a (Public Service Area) (Administrative Site) and it is recommended that you withdraw this area, subject to existing valid claims, from all forms of location and entry under the public land laws, including the U. S. Mining Laws and from leasing under the Mineral Leasing Act, in accordance with the authority vested in you by Executive Order No. 9337 of April 24, 1943, for the purpose of maintaining a (public camp ground) (ranger station) (lookout) (winter sports area).

Red Rock Forest Camp, National Forest, Montana.
Sec. 1, S½; Sec. 12, N½; NW¼ SW¼, T. 43 N., R. 60 W. M.P.M.
Total area 680 acres.

The consent of the Department of Agriculture to this withdrawal is hereby given in accordance with a delegation of authority signed by Secretary of Agriculture Charles F. Brannan on December 16, 1949.

Very sincerely yours,
LYLE F. WATTS,
Chief.

It is realized that this procedure involves a lot of work, but the results will, we believe, fully justify

the effort since these areas will then be fully protected against mineral locations.

Once a withdrawal has been made it will no longer be necessary to maintain administrative sites and recreation area notice signs after the withdrawals are effective, but we should continue to post areas in mineralized zones for the information of prospectors. A new metal poster will be prepared for this purpose.

Even though we have the informal concurrence of the Bureau of Land Management to this procedure, there is always a possibility that any new procedure might strike a snag somewhere along the line, especially one like this which must clear Interior and Justice. There seems to be very little chance that administrative sites actually occupied and used could be questioned, and we do not foresee much opposition to actually developed and used recreation areas. When it comes to potential recreation areas or recreation areas covering a large area, of which only a small part is actually used or developed, then it is possible that objections might be raised.

In view of this uncertainty, we do not want regions to go to a lot of work before the procedure has been definitely established. It is therefore suggested that you start planning to get all your special areas withdrawn, but that each region send in only two or three proposals until you receive notice that the withdrawals are actually going through. It is quite probable that the first cases sent in will be rather closely examined, and your

initial proposals should therefore be average, run-of-the-mill recreation areas with a reasonable buffer zone and developed administrative sites. Undeveloped areas or roadside zones should be left for later on.

After you get notice that the procedure has been successfully established we hope that you will try to finish the entire job in the next three years.

Very sincerely yours,

LYLE F. WATTS,
Chief.

By C. W. GRANGE.

EXHIBIT C

Recreation

Recreation Areas and the General Policies Governing Their Designation and Use

NF-G3

Where planning indicates that recreation use should be dominant or co-dominant, it is generally desirable to establish definite recreation areas. The Forest Service recognized some 22 different types of recreation areas in this planning.

Recreation Areas—General

Reg. U-1. Wilderness Areas.

Upon recommendation of the Chief, Forest Service, National Forest lands in single tracts of not less than 100,000 acres may be designated by the Secretary as "wilderness areas," within which there shall be no roads or other provision for motor-

ized transportation, no commercial timber cutting, and no occupancy under special-use permit for hotels, stores, resorts, summer homes, organization camps, hunting and fishing lodges, or similar uses; provided, however, that where roads are necessary for ingress or egress to private property these may be allowed under appropriate conditions determined by the forest supervisor, and the boundary of the wilderness area shall thereupon be modified to exclude the portion affected by the road.

Grazing of domestic livestock, development of water storage projects which do not involve road construction, and improvements necessary for fire protection may be permitted subject to such restrictions as the Chief deems desirable. Within such designated wildernesses, the landing of airplanes on National Forest land or water and the use of motorboats on National Forest waters are prohibited, except where such use has already become well established or for administrative needs and emergencies.

Wilderness areas will not be modified or eliminated except by order of the Secretary. Notice of every proposed establishment, modification, or elimination will be published or publicly posted by the Forest Service for a period of at least 90 days prior to the approval of the contemplated order and if there is any demand for a public hearing, the regional forester shall hold such hearing and make full report thereon to the Chief of the Forest Service, who will submit it with his recommendations to the Secretary.

Reg. U-2. Wild Areas.

Suitable areas of National Forest land in single tracts of less than 100,000 acres but not less than 5,000 acres may be designated by the Chief, Forest Service, as "wild areas," which will be administered in the same manner as wilderness areas, with the same restrictions upon their use. The procedure for establishment, modification, or elimination of wild areas shall be as for wilderness areas, except that final action in each case will be by the Chief.

Reg. U-3. Recreation Areas.

Suitable areas of National Forest Land, other than wilderness or wild areas, which should be managed principally for recreation use may be given special classification as follows:

(a) Areas which should be managed principally for recreation use substantially in their natural condition and on which, in the discretion of the officer making the classification, certain other uses may or may not be permitted, may be approved and classified by the Chief of the Forest Service or by such officers as he may designate if the particular area is less than 100,000 acres. Areas of 100,000 acres or more will be approved and classified by the Secretary of Agriculture.

(b) Areas which should be managed for public recreation requiring development and substantial improvements may be given special classification as public recreation areas. Areas on single tracts of not more than 160 acres may be approved and classified by the Chief of the Forest Service or by

such officers as he may designate. Areas in excess of 160 acres will be classified by the Secretary of Agriculture. Classification hereunder may include areas used or selected to be used for development and maintenance as camp grounds, picnic grounds, organization camps, resorts, public service sites (such as for restaurants, filling stations, stores, horse and boat liveries, garages, and similar types of public service accommodations), bathing beaches, winter sports areas, lodges, and similar facilities and appurtenant structures needed by the public to enjoy the recreation resources of the National Forests. The boundaries of all areas so classified shall be clearly marked on the ground and notices of such classification shall be posted at conspicuous places thereon. Areas classified hereunder shall thereby be set apart and reserved for public recreation use and such classification shall constitute a formal closing of the area to any use or occupancy inconsistent with the classification.

Classification of Recreation Areas.

*The authority conferred upon the Chief by Reg. U-3 is hereby delegated to the regional foresters except that classification of Roadless and Virgin areas will be by the Chief. Regional foresters may redelegate to forest supervisors authority to classify recreation areas under Reg. U-3 (b).

*Reg. U-3 (b) affords the maximum protection against mineral location which the Secretary of Agriculture can give and classification thereunder

*Amended December, 1948.

is desirable for all recreation areas, developed or potential, which are in mineralized areas on National Forest lands withdrawn from the public domain.

Although development and use of an area as a recreation area or occupancy under special-use permit is considered superior to a subsequent mineral location, classification under Reg. U-3 (b) will strengthen that position, particularly in respect to scattered unoccupied portions of a large developed area.

Care must be exercised in classifying potential recreation areas under this regulation. To qualify as areas "selected to be used for development," areas must be in the advanced planning stage and must be on the program for immediate construction if funds were available. Unreasonable classifications would be detrimental and will be avoided.

Recommendations for classification of areas by the Secretary must include:

1. Name of area, Forest, State, county, legal description.

2. Map (scale 4 inc. = 1 mile or larger) showing: area boundaries, improvements and developments extant and proposed.

3. Short description of area, length of season, kinds of use and amount, cost of improvements, etc.

4. For potential areas: described need for area, estimated cost of development, estimated use, date construction is planned.

Posting Classified Areas.

Recreation areas classified under Reg. U-3 (b) will be described and shown on a map.

The following form of classification notice will be typed, printed or stamped on the map or firmly attached thereto:

1. Areas classified by the Secretary of Agriculture (over 160 acres).

"........................ Recreation Area

"By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35), and the Act of February 1, 1905 (30 Stat. 628), and in accordance with Regulation U-3 (b) (Sec. 251.22, Chapter II, Title 36 CFR), of this Department this area, as shown by this map and legal description, is classified as the (name of area) Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"................

"Date

"........................,

"Secretary of Agriculture."

2. Areas classified by forest officers under delegated authority (under 160 acres).

"........................ Recreation Area

"By virtue of the authority vested in me by Regu-

lation U-3 (b) (Sec. 251.22, Chapter II, Title 36 CFR) of the Secretary of Agriculture this area, as shown by the attached map and legal description, is classified as the (name of area) Recreation Areas and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"................

"Date

"........................,

"Title."

Copies of the map and signed classification notice will be on file in the forest supervisor's office and such other places as designated by the regional forester.

All recreation areas classified under Reg. U-3 (b) will be conspicuously posted with "Classified Recreation Area" signs, Form 394-B. These signs will be posted at frequent intervals along the boundary of the area and at prominent places within the area, such as along routes of travel. The objective is to post the area in such a manner that any diligent person will know that it is classified. The wording of Form 394-B is:

"Clasified Recreation Area

"................ National Forest

"This area of National Forest land has been classified under Regulation U-3 (b) as a recreation area and is thereby set apart and reserved for public

recreation use and is closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

"A map and description of the area so classified and the classification order are on file at the office of the Forest Supervisor of the above-named National Forest."

*Withdrawal of Recreation Areas by Public Land Order.

The withdrawal by public land order of lands used or needed for recreation purposes affords protection against mining claims. Public land order withdrawals are made by the Secretary of the Interior under the provisions of Executive Order No. 9337 with the recommendation of the Secretary of Agriculture. They must be cleared through the Budget Bureau and Attorney General's office and are not effective until published in the Federal Register. Pending preparation of the "Withdrawal and Classification" chapter of the Manual, field officers should be guided by Circular Letters U-220 and U-220-Supplement dated December 16, 1949, and March 1, 1950, respectively, unless superseded by subsequent instructions.*

Reg. U-5. Public Camp Grounds.

Public camp grounds established upon National Forest lands which are improved by the Forest Service, either from public funds or in cooperation

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*Amended June, 1951.

with other public or private agencies, are for transient use by the public and shall not be occupied for extended periods or used for forms of occupancy which, in the opinion of the forest supervisor, are contrary to general public interest. The forest supervisor may, in his discretion, prohibit the occupancy of designated camp grounds by house trailers, the erection or use of unsightly and inappropriate structures or appurtenances, and may fix a maximum limit upon the number of consecutive days during which any person or group of persons may occupy a designated camp ground. Notice of such prohibitions or restrictions shall be given by a sign posted within said camp ground, and occupancy or use of the ground in violation of such prohibitions or restrictions is prohibited. Regulation L-19 is hereby revoked.

Management.

All recreation areas will be managed according to the management plans or objectives set up for them.

[Endorsed]: Filed July 14, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR TRANSMITTAL OF COPIES OF EXHIBITS OFFERED AND REFUSED AS PART OF THE RECORD ON APPEAL

State of Washington,
County of King—ss.

Donald McLellan Davidson, being first duly sworn, on oath deposes and says:

1. Exhibits A, B, and C annexed to defendant's motion for transmittal of exhibits filed herein on July 14, 1952, were prepared as follows:

(a) Exhibit A is a copy of a copy of the original exhibit. Stanley D. Baskin, attorney for plaintiff, during the course of the trial or just prior thereto, prepared a copy of the original and furnished it to defendant's attorney with the request that it be agreed that the copy could be offered in evidence in lieu of the original. Defendant so agreed. Plaintiff failed to offer the copy, and defendant then offered the copy which had been prepared by plaintiff.

(b) Exhibits B and C annexed to said motion are copies of copies of the original exhibits. The copies were furnished to defendant pursuant upon agreement made in open court after the originals had been offered in evidence and refused, and after plaintiff objected to their being marked for identification for purposes of incorporating them in the record on appeal. Exhibit A annexed hereto is the

letter of P. J. Gilmore, Jr., furnishing copies of Exhibits B and C to defendant.

2. All of the copies offered in evidence were either originals or copies prepared by plaintiff, and the copies annexed to defendant's motion were prepared from copies furnished by plaintiff.

3. The originals of such exhibits were at the time of trial in the possession of plaintiff's attorneys and were furnished to them by the United States Forest Service with offices in the same building as plaintiff's attorneys. Exhibits B and C are now, without question, available in the same building as plaintiff's attorneys.

4. Defendant is willing that the originals of the exhibits be transmitted in lieu of copies, but does not wish to burden the record with duplications of exhibits fully set forth in defendant's motion. Defendant is ready, willing and able to furnish the Court with the copies of Exhibits A, B and C prepared by plaintiff, but such copies would unnecessarily duplicate matters already in the record.

Wherefore, defendant submits that each of the following objections raised in plaintiff's motion for an order denying defendant's motion are frivolous.

(a) "The originals and not copies of said exhibits should be sent up to said Court of Appeals," because plaintiff agreed that copies could be offered in evidence, and because originals were offered at the trial and plaintiff delivered copies of such originals for use upon an appeal.

(b) "That this office does not have at its disposal all of the original exhibits to compare with the copies as set forth in defendant's said motion," because at least two of the three exhibits are available within the same building, and the third original exhibit was in plaintiff's possession at the time of trial and copies made by plaintiff for submission in lieu of the original.

(c) "It will be a burdensome and time consuming task to compare said copies with said original exhibits," because plaintiff has, or is able to furnish, the original exhibits, and has made and furnished copies to defendant, and has compared the originals with the copies.

Respectfully submitted,

/s/ DONALD McL. DAVIDSON,
Of Attorneys for Defendant.

Subscribed and sworn to before me this 14th day of August, 1952.

/s/ VIRGINIA H. BECK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed August 15, 1952.

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan

No. 3174-KA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

H. F. SCHAUB,
Defendant.

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 25th day of January, 1952, at 11:25 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for trial before the Court without a jury, the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Stanley Baskin, Assistant United States Attorney; the defendant appearing in person and by Wilfred C. Stump and Donald McL. Davidson, of his attorneys; and the following occurred:

Mr. Stump: Your Honor, at this time I would like to move the admission of Donald Davidson, who is a member of the State of New York Bar for the Second Circuit and also the Court of Claims. I have known Mr. Davidson for some time. He is presently with a Seattle firm, where he moved in the last year. I am also acquainted with his reputation and his integrity, and I would like to move his admission as co-counsel in this case. [1*]

The Court: Mr. Davidson may be associated

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

with you in connection with the trial of this case. Now, have the parties narrowed the issues any further, or the proof that will be presented here, by conferences between them since the pretrial conference in chambers?

Mr. Baskin: May it please the Court, we did have a conference, and there have been some answers to requests for admissions which have narrowed the factual issues some, and there will be an introduction of stipulation of some evidence perhaps that we will have to write up and submit to the Court in writing.

The Court: Can we go ahead with the hearing in view of the fact that this hasn't been reduced to writing?

Mr. Baskin: Yes, sir. I don't object to that.

The Court: Very well. You may proceed then.

Mr. Baskin: Does the Court wish us to make opening statements?

The Court: Yes.

Whereupon, opening statements were made by Mr. Baskin for the Government and by Mr. Stump and Mr. Davidson for the defendant; and thereafter, Court having reconvened at 2:00 o'clock p.m. on the 25th day of January, 1952, with all parties present as heretofore, the trial proceeded as follows:

The Court: You may proceed. [2]

Plaintiff's Case

Mr. Baskin: May it please the Court, I have several exhibits here I have filed with the Clerk I would like to introduce. Here is plaintiff's request

for defendant's admission as to proof of statements under Rule 36, the defendant's answers to the request, and then we have a second set of requests for admissions, and I believe they have answered that too. Yes, they have. You have no objection to certified copies? And I have, to introduce as an exhibit, certified copies of the Forest Service Manual issued February 1, 1926, pages Roman numeral three and then pages 57-L and 61-L, and Regulation Three of the Secretary of Agriculture of October 3, 1939.

The Court: You offer that as an exhibit?

Mr. Baskin: Yes, may it please the Court.

The Court: It may be admitted as Plaintiff's Exhibit No. 1.

PLAINTIFF'S EXHIBIT No. 1

United States of America,
Territory of Alaska.

I, B. Frank Heintzelman, Regional Forester, United States Forest Service, Department of Agriculture, Juneau, Alaska, do hereby certify:

That I am the legal custodian of records and files of the United States Forest Service, Juneau, Alaska, and I have compared the foregoing with our record copies of page III, pages 57-L and 61-L of the Forest Service Manual issued February 1, 1926, and in force September, 1940; and Regulation U-3 of the Secretary of Agriculture of October 3, 1939, of pages 40, GA-A3, Volume 1, Forest Service Manual amended October, 1939, and enforced

Plaintiff's Exhibit No. 1—(Continued)

during September, 1940, and have found the copies to be complete and true of the original regulations.

Dated this 18th day of January, 1952.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester, United States Forest Service, Juneau, Alaska.

Subscribed and sworn to before me this 18th day of January, 1952.

[Seal] /s/ GEORGE J. HAEN,
Notary Public.

My commission expires Dec. 12, 1954.

(True Copy)

United States Department of Agriculture,
Office of the Secretary,
Washington, D. C.

By virtue of the authority vested in the Secretary of Agriculture by the Act of Congress of February 1, 1905 (33 Stat. 628), amendatory of the Act of Congress of June 4, 1897 (30 Stat. 11), I, William M. Jardine, Secretary of Agriculture, do make and publish the following regulations for the occupancy, use, protection, and administration of the national forests, the same to supersede all previous regulations for like purposes and to be in force and effect from the 1st day of July, 1926, and to constitute a part of the National Forest Manual. And the Forester is hereby authorized and

Plaintiff's Exhibit No. 1—(Continued)

directed to issue such instructions to the officers and employees of the Forest Service and to established such procedure for the guidance of the users of the national forests as may be necessary to carry these regulations into effect.

In testimony whereof I have hereunto set my hand and official seal at Washington, D. C., this 1st day of February, 1926.

[Seal] W. M. JARDINE,
Secretary of Agriculture.

United States Department of Agriculture
Forest Service

February 1, 1926.

Under authority from the Secretary of Agriculture, dated February 1, 1926, the following inscription and procedure are hereby issued and established for the guidance of the employees of the Forest Service and of the users of the national forests in carrying into effect the regulations of the Secretary of Agriculture.

W. B. GREELEY,
Forester.

(III)

Plaintiff's Exhibit No. 1—(Continued)

(True Copy)

April, 1929.

Reserve Sites

Reason for Reserving.

To insure the efficient administration, protection, improvement, and use of the national forests and their resources certain tracts must be retained in public ownership for strictly public uses. These include areas for headquarters stations, lookout stations, roads, telephone lines, pastures, planting and nursery sites, and for similar purposes needed in the work of Government officers charged with the administration, protection, and improvement of the forests. They include, also, areas essential to the use and disposal of national forest timber for mill sites, logging roads, banking grounds, chutes, etc., and areas necessary to the proper utilization of the forage resources of the forests, for watering places, lambing grounds, stock driveways, holding grounds, and the like. Recreational use of the forests is also recognized by law, and this requires the retention of camping grounds and similar places for the accommodation of the public. Likewise, tracts embracing watersheds from which the water supply of municipalities is taken should be retained for protection against contamination and pollution. While land classification has removed most of the danger that tracts valuable for public purposes will be listed, a continuation of the practice of reserving such tracts is desirable to emphasize their special values and to prevent impairment of those values

Plaintiff's Exhibit No. 1—(Continued)

by issuance of ill-considered permits. Their reservation also keeps constantly in view the specific purposes the tracts are adapted to and aids in formulating adequate and comprehensive administrative plans.

Kinds of Reserved Sites.

Two classes of reserved sites are recognized:

First, administrative sites, which include all areas reserved for the purpose of facilitating the ordinary administration, protection, and improvement of the forests by forest officers, such as ranger stations, summer pastures, lookout stations, and other similar purposes.

Second, public service sites, which embrace all areas needed for the proper utilization of national forest resources, such as camp grounds, water holes, mill sites, and like uses.

How Reserved.

The use or occupancy of a given tract of land for any of the above purposes is the most simple and effective form of reservation. Next to this is a formal dedication of the area to a specific use in the future by plans proposed and approved. Not all reserved areas are made a matter of formal record or posting. In a certain sense all national forest lands are reserved for public service purposes, and any area may be used for the purposes enumerated. Special reservation is necessary only where there may be some other demand for the land, and only areas which may possibly be later

Plaintiff's Exhibit No. 1—(Continued)

claimed or coveted for private purposes require the protection of a recorded dedication. Such special reservation is accomplished by use or dedication inside the forests, or use or Executive order outside the forests. In either case it should be made a matter of formal record.

(57-L)

(True Copy)

April, 1933.

Public-Service Sites

Tracts which must be retained under the control of the Government for sawmills, banking grounds, and other purposes incidental to the cutting, removal, or management of national-forest timber; for lambing grounds, watering places, driveways, etc., affecting the management of the grazing resources of the forests; for the protection of watersheds on which the water supply of municipalities depends; and for recreational and similar purposes, will, when necessary, be posted or selected as public-service sites. Areas so withheld are distinct from administrative sites reserved for the protection and proper administration of the forests.

The indiscriminate posting and selection of tracts having merely a conjectural value for public-service purposes is inadvisable. Land classified as non-agricultural is sufficiently protected by the classification for ordinary public-service purposes except when situated in a mineralized region. Hence, only

Plaintiff's Exhibit No. 1—(Continued)

those areas which have possible agricultural or mineral value, and are obviously very necessary in connection with the proper utilization of national forest resources, need be selected, posted, and recorded as public-service sites.

Tracts obviously needed for public-service purposes, but which, because of their situation in a mineralized region or some other reason, are liable to be located or claimed under any of the land laws of the United States applicable thereto, should be prominently posted by reserved-site notices, Form 263a, but formal survey and selection will not be made unless specially directed by the regional forester.

The general procedure prescribed for the selection, approval, and recording of administrative sites will apply to public-service sites, except that reserved-site notices, Form 263a, will be used for posting. Each selected tract will, after approval by the supervisor, be entered on the status record (Form 123) by outline in dark-green crayon and its designation shown in green ink. An index sheet similar to that for administrative sites will be provided in both the regional office and the supervisor's office and a separate "Public-service site" file will be kept in which the cases will be filed alphabetically. After the report has been approved by the regional forester, the tract will be crosshatched dark green on the status record.

No consideration will be given to public-service

Plaintiff's Exhibit No. 1—(Continued)

sites in the statistical report (Form 446) unless specially directed by the Forester.

Sanitation.

For instructions in regard to sanitation on either administrative sites or on public-service sites see Regulation P-4. "Protection of the public health," in the administrative section of the manual.

(61-L)

(True Copy)

Public-Service Sites

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Plaintiff's Exhibit No. 1—(Continued)

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No consideration will be given to public-service sites in the statistical report (Form 446) unless specially directed by the Forester.

Plaintiff's Exhibit No. 1—(Continued)

Sanitation.

For instructions in regard to sanitation on either administrative sites or on public-service sites see Regulation P-4. "Protection of the public health," in the administrative section of the manual.

(61-L)

Excerpt From Page (40), GA-A3, Volume I,
Forest Service Manual
*Amended October, 1939.

*Land Uses

*Recreation Areas

*Reg. U-3. Suitable areas of national forest land other than wilderness or wild areas which should be managed principally for recreation use but on which certain other uses may or may not be permitted may be given special classification. Areas in excess of 100,000 acres will be approved by the Secretary of Agriculture; areas of less than 100,000 acres may be approved by the Chief, Forest Service, or by such officers as he may designate. (Revised Oct. 3, 1939).

Receipt of copy acknowledged.

Received in evidence January 25, 1952.

Mr. Baskin: And then I offer, as Exhibit No. 2, certified copies of the Forest Service Regulations U-10 and U-11.

Clerk of Court: That will be Plaintiff's Exhibit No. 2.

PLAINTIFF'S EXHIBIT No. 2

United States of America,
Territory of Alaska—ss.

I, B. Frank Heintzleman, Regional Forester, United States Forest Service, Department of Agriculture, Juneau, Alaska, do hereby certify:

That I am the legal custodian of records and files of the United States Forest Service, Juneau, Alaska, and I have compared the foregoing with our record copies of Regulations U-10 and U-11 of the Secretary of Agriculture pertaining to administration of United States Forest Service and the Chief Forester's delegation of authority to the Regional Forester, Sections NF-H5, pages 1 to 2, and NF-H5, pages 1 to 4, Volume 3 of the National Forest Manual, and have found the copies to be complete and true of the original regulations.

Dated this 18th day of January, 1952.

/s/ B. FRANK HEINTZLEMAN,
Regional Forester, United States Forest Service,
Juneau, Alaska.

Subscribed and sworn to before me this 18th day of January, 1952.

[Seal] /s/ GEORGE J. HAEN,
Notary Public.

My commission expires Dec. 12, 1954.

Plaintiff's Exhibit No. 2—(Continued)

(Copy)

Special Land Uses

NF-H5

Basic Regulation, Requirements, and Limitations

*Reg. U-10. Special use permits, Archaeological Permits, Leases, and Easements; General Conditions. All uses of National Forest Lands, improvements, and resources, including the uses authorized by the Act of March 4, 1915 (38 Stat. 1101; 16 U.S.C. 497), and the Act of March 30, 1948 (Public Law 465, 80th Cong.; 62 Stat. 100), and excepting those provided for in the Regulations governing the disposal of timber and the grazing of livestock or specifically authorized by Acts of Congress, shall be designated "Special Uses," and shall be authorized by "Special Use Permits."

The temporary use or occupancy of National Forest Lands by individuals for camping, picnicking, hiking, fishing, hunting, riding, and similar purposes, may be allowed without a special use permit; provided, permits may be required for such uses when in the judgment of the Chief of the Forest Service the public interest or the protection of the National Forest requires the issuance of permits.

Special use permits shall be issued by the Chief of the Forest Service or, upon authorization from him, by the Regional Forester, Forest Supervisor,

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

or Forest Ranger, except as herein provided, and shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the Regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.

Special use permittees shall comply with all State and Federal Laws and all Regulations of the Secretary of Agriculture relating to the National Forests and shall conduct themselves in an orderly manner.

A special use permit may be terminated with the consent of the permittee, or because of nonpayment of fees, by the officer by whom it was issued or his successor, but may be revoked or canceled only by the Secretary of Agriculture or by an officer of the Forest Service superior in rank to the one by whom it was issued, except that a term permit may be revoked only for breach of its terms or violation of law or regulation. Appeals from action relating to special use permits may be made, as provided in Sec. 211.2 (Reg. A-10) of this Chapter.

A special use permit may be transferred with the approval of the issuing Forest Officer, his successor or superior.

Special use permits authorizing the operation of public service enterprises, such as hotels and resorts, shall require that the permittee charge reasonable rates and furnish such services as may be necessary in the public interest.

The Chief of the Forest Service is also authorized

Plaintiff's Exhibit No. 2—(Continued)

to issue permits, execute leases, and grant easements as follows:

Permits under the Act of June 8, 1906, (34 Stat. 225; 16 U.S.C. 431, 432), for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity in conformity with the uniform rules and regulations prescribed by the Secretaries of the Interior, Agriculture, and War, December 28, 1906. (43 CFR 3.1 to 3.17.)

Leases of land under the Act of February 28, 1899 (30 Stat. 908; 16 U.S.C. 495), in such form and containing such terms, stipulations, conditions and agreements as may be required in the public interest.

Easements for rights-of-way for telephone and telegraph lines under the provisions of the Act of March 4, 1911 (36 Stat. 1253; 16 U.S.C. 420), subject to such payments as may be equitable and to such stipulations as may be required for the protection and administration of the National Forests.

Nothing herein shall be construed to prohibit the temporary occupancy of National Forest lands without permit for the protection of life or property in emergencies, provided a special use permit for such use be obtained at the earliest opportunity.

*Note: The Act of March 30, 1948, applies to Alaska only.

Delegation of Authority.

*The authority to issue special use permits conferred upon the Chief in Reg. U-10 and subsequent

*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

regulations except Reg. U-18 is hereby delegated to the regional foresters subject to the restrictions set forth in the Manual on summer homes, ski lifts, resorts, roadside zones, and dams. Regional foresters may delegate this authority subject to the following restrictions:

1. The authority to grant permits under Reg. U-14 will not be delegated except as specifically provided in the regulation.

2. The granting of permits under Reg. U-17 will not be delegated.

3. Term permits may be issued only by the regional forester or other officers to whom he may delegate this authority by special letter.

4. Airfield permits will be issued only by the regional forester.

*Authority to issue permits under the Acts of June 8, 1906 (Archaeological Explorations), and February 28, 1899 (Mineral Springs), and to grant telephone and telegraph line right-of-way easements under the Act of March 4, 1911, is reserved to the Chief.

*The authority to authorize the issuance of special use permits on experimental forests and ranges is delegated to regional foresters subject to Manual restrictions applicable to National Forest lands and provided that the approval of the station director is obtained.

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*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

(Copy)

Special Land Uses Noncharge Permits

NF-H5-1

Free Special Use Permits.

Reg. U-11. Free Special Use Permits. The Chief of the Forest Service may authorize the issuance of special use permits without charge when the use is (1) By a Governmental agency, (2) of a public or semi-public nature, (3) for noncommercial purposes, (4) in connection with an authorized utilization of national forest resources, (5) of benefit to the Government in the administration of the national forests, or for similar purposes compatible with the public interest, and when authorized and directed so to be issued by Acts of Congress.

Intent of Regulation.

Reg. U-11 both authorizes and limits free use of National Forest lands, resources, and improvements under certain specified conditions. The granting of free use is not permissible unless the use comes within the letter and intent of the regulation.

Classes of Special Use Permits Which May Be Issued Without Charge.

Regional foresters are authorized to issue free special use permits or may delegate this authority, for the following uses. Classes of uses which are not specifically mentioned in the following tabulation may not be granted free without prior approval of the Chief.

Plaintiff's Exhibit No. 2—(Continued)

*A. Uses by any department or branch of the Federal or State Governments, including municipalities, when no profit is to be derived from said uses; and co-operatives sponsored by the United States, such as REA.

(A Government agency would not be entitled to free use for a concession charging commercial rates, the profits of which went into the general fund for expenditures elsewhere.)

B. Cemeteries, churches, and public schools for settlers residing within the exterior boundaries of the forest, or in the vicinity thereof.

C. Uses of lands for public purposes under the sponsorship and management of associations or organizations which will make desirable forms or types of service or facilities available to the general public without requirements of membership or any form of class differentiation and without charge other than necessary and equitable to repay the reasonable cost of operation and maintenance or of special services or facilities furnished to individuals using the area.

D. Cabins for the use of miners, prospectors, trappers of predatory animals, stockmen in connection with grazing permits, and other permittees for temporary use in connection with authorized uses.

(Cabins used during the entire year as headquarters shall be classified as residences and charged

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*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

for. The need for the use must be primarily for the purpose specified. A stockman should not be allowed free use for the cow camp which is used primarily for summer home purposes.)

*E. Range facilities, i.e., (1) enclosures created by pasture, allotment boundary, drift, and division fences and the natural features to which they may be tied, and (2) corrals, dipping-vats, tanks or wells or pipelines to supply water for livestock, shipping pens, livestock driveways, structures for the housing of range supplies, riders or herders, etc., where the basic occupancy of the lands and use of the forage resources by the livestock to be served is (a) compensated for by annual payment of the prescribed grazing fees, or (b) authorized without charge under the provisions of Reg. G-3 (b) or Reg. U-15.

*Range facilities which are fully justified from a range management standpoint may be granted free; others must be on a charge basis. See Range Facilities, NF-H5-2; also Reg. G-9(a), NF-C9(1) and C9-2(1) and (2).

*Range facilities granted under free use must:

1. Contribute materially to proper management and administration of the range.

2. Be available for use (but not necessarily used) by other authorized grazing permittees.

F. Logging railroads, roads, flumes, tramways,

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*Amended June, 1949.

Plaintiff's Exhibit No. 2—(Continued)

enclosures, sawmills, kilns, and other improvements necessary to the manufacture of lumber or other products from timber obtained principally from the National Forests.

(Improvements of this nature may be authorized by appropriate clauses in timber sale agreements or permits, without charge, during the period of use, if needed for the utilization of National Forest timber.)

G. Conduits, dams, reservoirs, pumping stations, or any other water development projects for municipal, domestic, irrigation, mining, railroad, livestock watering, or other purpose of public value.

(Where the use of watersheds involves special forms of administration or utilization of forest products, specific agreements with equitable provisions for compensation will be required.)

H. Telephone lines with free use or free connections by Forest Service. Telegraph lines with free use of poles for attaching thereon of Forest Service lines. Power lines as stipulated under Rental Charges, NF-F2-3.

(Telephone and telegraph lines will be permitted without charge only if there is a reasonable probability that the Government will avail itself of the preferential service or the right to attach lines. Free use would not be warranted if there were no probability that the Government would ever need the reciprocal privileges.)

Plaintiff's Exhibit No. 2—(Continued)

I. Roads and trails which are free public highways, and airports and air navigation facilities which are open to the free use of the public.

J. Stone, earth, clay, gravel, marl, sod and similar materials used for projects constructed under permits, or for the construction or maintenance of public roads and trails, or by bona fide settlers, miners and prospectors for buildings or soil improvement purposes.

(Material of this kind will not be permitted free to contractors if the terms of the contract require the contractor to furnish all materials, since in such cases the contractor has figured the expense of purchasing material and to grant free use would be inconsistent with the purpose of this regulation.)

K. Fish hatcheries of a noncommercial nature.

L. Campfire or other permits for temporary use or occupancy, when required, as defined by Reg. U-10.

M. Sewage systems.

N. Signs.

O. Occupancy of Forest Service buildings at times when the buildings would otherwise be vacant and when such occupancy would afford protection to them. Forest Service structures located outside the national forests are not subject to the special use procedure. (See NFH3 (6) and (7). "Lands

Plaintiff's Exhibit No. 2—(Continued)

Without National Forest Status" and "Lands Not Subject to Special Uses.")

(Free use will be allowed only when it can definitely be shown that the occupancy of the Government building is of definite advantage to the Forest Service or in the case of temporary per diem employees whose periods of employment are unpredictable where it is to the advantage of the Government to have them continue living in Government quarters so that they may be available on short notice to resume employment. This provision is particularly applicable to lookouts and forest guards.)

P. Former Owners. In the acquisition of lands for forestry purposes it not infrequently happens that prospective vendors are elderly people who are willing to sell their holdings provided they may be allowed to remain on the premises during their lives without charge, occupying such habitation as may be on the land and using a few acres surrounding the same. Assurance that this request will be granted is helpful in carrying on acquisition work and often an advantage to the Government. As the preferable alternative to the reservation of the right of use as a stipulation in the conveyance of title to the United States, free special use permits may be granted to the former owners in such cases for the period of their lives.

Q. Persons Residing Upon Land at the Time of Purchase. In a number of instances there are per-

Plaintiff's Exhibit No. 2—(Continued)

sons residing upon, but not the owners of, lands acquired by the United States for forestry purposes. Such occupants are often totally without financial resources of any kind and unable to advance even the modest fees charged under existing regulations for agricultural and residential use of national forest land. Their only means of subsistence other than relief being continued cultivation of the land, their eviction from the premises would result in increased suffering and an additional relief burden.

Free special use permits may be issued in those deserving cases in which the permittee agrees:

(1) That in order to conserve the fertility of the soil and prevent erosion, he will employ only such methods of cultivation as may be approved by the County Agent or the forest officer in charge.

(2) That he will, without charge, give his services in the suppression of such forest fires as may occur in the vicinity of the land occupied by him.

(3) That he will maintain the dwelling and other improvements including fences and terraces in a manner satisfactory to the forest officer in charge.

The issuance of such free use permits shall be limited:

(1) To persons actually resident upon the lands at the time of acquisition who are, upon investigation, found to be unable to pay the usual fees.

Plaintiff's Exhibit No. 2—(Continued)

(2) To lands of such quality and topography as will allow cultivation without material damage by erosion.

(3) To lands having a habitable dwelling.

R. Parcelero System in Puerto Rico. Under what is known as the Parcelero System in Puerto Rico, free special use permits for cultivation and residence in deserving cases may be issued, if the land is of such quality and topography as will permit cultivation without material damage by erosion—and if the permittees agree to plant to forest trees certain portions of their parcels and tend such plantations as required by forest officers in charge. In the tropics it is often practicable to grow food crops between rows of planted trees and thereby afford the trees the cultivation necessary to their satisfactory development.

S. Motion Pictures. When the use is of a temporary character and does not involve any physical changes in the land or damage to resources or structural occupancy. (See also, **Motion Pictures, NF-H5-2.**)

Procedure.

The uses authorized above will be permitted without charge when used for the purpose or in the manner specified. Permits will include the usual stipulations in regard to protection of national forest interests and will provide that the permit will terminate if the permittee does not use the premises as contemplated by Reg. U-11.

Plaintiff's Exhibit No. 2—(Continued)

Application, survey maps, issuance of permits, etc., will be handled the same as for other special use permits.

Free special use permits shall be issued with one "original," one "duplicate," and one "ranger's copy," promptly upon the approval of the application. Section 1 of Form 832, if used, shall be deleted and in its place shall appear "Issued free of charge under authority of Reg. U-11 (*)."

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*(Insert in blank space the instruction under Reg. U-11 which is applicable.)

Receipt of copy acknowledged.

Received in evidence January 25, 1952.

Mr. Baskin: May it please the Court, there was a matter of amending our complaint to correctly state a regulation. Paragraph Four of our complaint, I would like to move to amend the last sentence by striking the words or the [3] figures and letters "36 CFR 251.22" and adding "an order of the Secretary of Agriculture dated February 1, 1926, and regulations of the National Forest Manual, pages 57-L and 61-L."

The Court: You better read that over again so I can make the amendment by interlineation. "An order of——

Mr. Baskin: "An order of the Secretary of Agriculture dated February 1, 1926, and regula-

tions of the National Forest Manual, pages 57-L and 61-L."

The Court: That is the pages?

Mr. Baskin: Those are the page numbers; yes.

The Court: 57-L and——

Mr. Baskin: And 61-L.

The Court: Well, the amendment is allowed.

CHESTER M. ARCHBOLD

called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Chester A. Archbold.

Q. Where do you live, Mr. Archbold?

A. Ketchikan, Alaska.

Q. Who are you employed by?

A. United States Forest Service, Department of Agriculture. [4]

Q. How long have you been employed by the Forest Service? A. Since July 1, 1924.

Q. And where are you stationed at the present time? A. At Ketchikan, Alaska.

Q. How long have you been stationed at Ketchikan? A. Since September of 1931.

Q. Now, what is your official title, and briefly state what your duties are?

A. My title is Division Supervisor of the Southern Division of the Tongass National Forest, and I have to do with operating the Southern Division

(Testimony of Chester A. Archbold)
according to the policies and standards set up in the National Forest Manual.

Q. And is that under the supervision of the Regional Forester here in Juneau, Alaska?

A. It is. It comes under the Regional Forester here at Juneau, Alaska.

Q. Mr. Archbold, are you acquainted with the thirty-seven and a half acres of land which has been withdrawn for the use of the Bureau of Public Roads? A. I am.

Q. Where is that land located?

A. It is located slightly beyond Mile 12 on North Tongass Highway at the point known as Whipple Creek.

Q. What island is that on?

A. It is on Revillagigedo Island. [5]

Q. That is north of Ketchikan, Alaska?

A. It is.

Q. Mr. Archbold, when to your knowledge was the first removal of gravel from that Whipple Creek area?

A. At the time the extension of North Tongass Highway went past Whipple Creek the Bureau of Public Roads removed gravel from above the bridge and below the bridge to make the approaches to the bridge there.

Q. What year was that?

A. During the year of 1934, as I recall it.

The Court: '34, you say?

A. 1934; yes.

Q. (By Mr. Baskin): You are familiar with

(Testimony of Chester A. Archbold)

the thirty-seven acres that were withdrawn, are you not? A. I am.

Q. And doesn't—I am speaking of the thirty-seven and a half acres that was withdrawn by the Public Land Order—734, I believe.

The Court: Well, maybe we can shorten this up if you just state the tract involved in this controversy.

Mr. Baskin: Very well.

A. I am acquainted with that; yes, sir.

Q. (By Mr. Baskin): Are you acquainted with the tract of land or the area which the defendant claims that overlaps onto the Government's thirty-seven acres? [6]

A. I am acquainted with that also.

Q. Now, in 1934, did the Bureau of Public Roads remove sand and gravel from that part of the land that is claimed by the defendant?

A. They removed gravel from probably fifty to seventy-five feet within this claim.

Q. And would that be the claim, the end of the claim, that is nearest the road?

A. The lower extremities of the claim; yes, sir.

The Court: When you speak of the claim, you are speaking of the defendant's claim?

A. That is right.

Q. (By Mr. Baskin): Now, has the Forest Service done anything in the way of preparing that thirty-seven acres or part of that thirty-seven acres for a public service site? A. We have.

(Testimony of Chester A. Archbold)

Q. Tell the Court just what they did in connection with that?

A. In the year about 1935 the Regional Forester looked the area over with the idea of planning for recreational purposes there. It didn't get into much beyond the planning stage until about 1940 when we surveyed the area, posted it as a public service site, ninety-one and thirteen-hundredths acres at that time, and that was accomplished by my ranger, A. W. Hodgman, on August 12 to 16, 1940. That plan was approved by the Regional Forester [7]—the Assistant Regional Forester—on September 11, 1940. By a letter dated August 6, 1940, an allotment request for Civilian Conservation Corps labor was approved for a limited amount of brushing and clearing on the area. By another letter dated September 4, 1940, I advised the Regional Office that fifty Civilian Conservation Corps men were working on the area. The work completed then was in brushing out trails, clearing out underbrush for a picnic area, cutting up windfalls for firewood, and cutting out several trails, one on each side of the creek running up into the area and into this mining claim. There were over five hundred man-days of Civilian Conservation Corps work reported at that time.

Q. Now, are you familiar with where that work was performed by those Civilian Conservation Corps men? A. I was.

Q. Tell the Court where that work was done.

A. It was done within the, along both banks of

(Testimony of Chester A. Archbold)

Whipple Creek and extending in a northeasterly direction about eight to nine hundred feet on both sides of the creek.

Q. And was that a part of the area that the defendant now claims?

A. That goes within that area.

Q. Now, were there any claims ever filed against this, the land on both sides of Whipple Creek? [8]

Mr. Stump: May it please the Court, I wondered about the materiality of another claim.

The Court: You asked whether there were other claims?

Mr. Baskin: Yes. I asked if there were any other claims that were filed on the area that the defendant now claims.

Mr. Stump: I question the materiality, your Honor. In his opening statement he said a gold mineral claim was filed but that it was decided that there was no discovery. It wouldn't be material to this.

The Court: Do you claim any materiality for this?

Mr. Baskin: May it please the Court, I am claiming, the relevancy is this, that the Forest Service protested that claim for the purpose of protecting this area for the use as a public service site and that through their protest it was finally decided by the Commissioner of the General Public Land Office that his claim was not valid. I am showing that the efforts on the part of the plaintiff to protect this area as a public service site——

(Testimony of Chester A. Archbold)

The Court: Well, you can ask him that without bringing out the facts of the location of claims unless your claim that the Forest Service has always attempted to exercise exclusive control over this area is challenged or any effort is made to discredit it when you [9] could bring in this evidence, you are now trying to bring in, by way of rebuttal. In other words, for your prima-facie case all you need to do is show that the Forest Service, if that is a fact, exercised or attempted to exercise and claim the right of exclusive control over this area.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Now, Mr. Archbold, was gravel ever removed from that area, after the Civilian Conservation Corps performed that work on it, for the purpose of building roads by any agencies of the Government? A. There was.

Q. All right. What year was gravel removed from there?

A. During 1942 the United States Coast Guard completed a small road project of about two thousand feet in length at their Point Higgins Radio Station, and gravel and rock was taken from Whipple Creek to build that road.

Q. Did the Forest Service consent for the Coast Guard to remove that gravel for that purpose?

A. We did.

Q. And tell the Court where that gravel was removed from.

A. The gravel was removed from above and below the Whipple Creek Bridge and extended up

(Testimony of Chester A. Archbold)

into the present claim fifty to one hundred feet in the stream bed.

Q. And when you say the "present claim," are you speaking of the defendant's claim? [10]

A. Yes, the defendant's claim; the one in the case.

Q. Do you know about how much gravel was removed from his claim?

A. I could not say. I would imagine probably as much as three or four hundred yards of the total, cubic yards.

Q. Now, does the Forest Service engage in the construction of roads in Southeastern Alaska?

A. It does; minor roads under the forest road development program.

Q. And on Revillagigedo Island has the Forest Service constructed any roads?

A. On our minor roads system down there we have about eleven miles of minor roads in addition to the Tongass Highway.

Q. Did the Forest Service construct the Tongass Highway?

A. We did not. It is a forest highway constructed from forest highway funds by the Bureau of Public Roads and maintained by the Bureau of Public Roads.

Q. But the Forest Service pays the Bureau of Public Roads to build and maintain the road, is that correct?

A. Under the present system the allotment is

(Testimony of Chester A. Archbold)
set up to them rather than to us, appropriated for them.

Q. When was the present allotment system changed? Was it ever any different than what it is now? In other words, did you formerly pay them to build and maintain the Tongass Highway? [11]

A. Well, it didn't work that way.

Q. Well, tell the Court just how it did work then.

A. The Bureau of Public Roads used to be within the Department of Agriculture years ago, and it has been changed from one agency to another. It is now under the Department of Commerce, and the appropriation is set up by Congress directly to the Department of Commerce now.

Q. But when the Tongass Highway was built, was that paid for by Forest Service funds?

A. It was paid from the forest highway funds; yes.

Q. And in addition to the Tongass Highway, how many miles of road does the Forest Service have in that vicinity?

A. We have approximately eleven miles of minor roads in and around Ketchikan.

Q. Now, has the Forest Service by its own employees removed gravel from the defendant's claim for the purpose of constructing roads?

A. You mean with our own equipment?

Q. With your own equipment and your own employees? A. No, we have not.

Q. Well, how has that gravel been removed?

(Testimony of Chester A. Archbold)

A. The gravel has been removed by contract. We have been contracting since 1948, putting the bids out on a competitive basis and going to the lowest bidder.

Q. But you pay for that out of the Forest Service funds? [12] A. That is right.

Q. Now, have you had any contracts, have you let any contracts for the purpose of constructing roads in that vicinity?

A. We have. We have let three or four major contracts.

Q. When was your first one?

A. On July 27, 1948, Berg Construction Company was awarded a contract, No. 810 FS 815. They removed 15,369 cubic yards of borrow fill and surfacing for the South Point Higgins Road during 1948 and 1949.

Q. Well, how much was the total cost of that contract construction job?

A. The total cost for that was——

Mr. Stump: May it please the Court, I don't wish to object all the time, but the cost of that contract is not relevant.

The Court: I don't see the materiality of it either.

Mr. Davidson: The contract would speak for itself.

The Court: What I wonder about is about the admissibility of it at all. What do you claim for evidence of jobs of this kind?

(Testimony of Chester A. Archbold)

Mr. Baskin: Well, I am claiming, may it please the Court, that——

The Court: I mean, on a hearing for preliminary [13] injunction it would all be very relevant, but why is it relevant now?

Mr. Baskin: To show removal of gravel for the purpose of constructing roads. Actually, the contract, I will agree, isn't relevant, but all I am endeavoring to show is the removal of the gravel, may it please the Court.

The Court: For the purpose of showing what, proving what?

Mr. Baskin: That the Government has used this area as a site for the removal of sand and gravel in constructing Forest Service roads.

The Court: Why do you have to go that far back? He claims here under a purported location in June, 1951. Why don't you limit the evidence to a reasonable period antedating his claimed location?

Mr. Baskin: I am endeavoring to show, may it please the Court, I think that it is material and that we should show all of the acts of the Government in appropriating this land, and I think that, commencing back at least in 1948 when they let contracts for the construction of roads and removal of that gravel, that that is pertinent now; that antedates the defendant's claim.

The Court: Well, you don't have to show all that in order to dispute his claim. All you need to show is an appropriation or use or possession of

(Testimony of Chester A. Archbold)

this area at the time [14] he went in and made his location.

Mr. Baskin: Well, this is the whole point. I am showing all of the removal of the gravel as part of the possession.

The Court: But possession in 1948 is immaterial. It is the possession at the time of his location.

Mr. Baskin: Or prior to that time.

The Court: Well, within a reasonable time, as I said. But it wouldn't extend for years back. That is getting to be too remote.

Mr. Baskin: Well, but, may it please the Court, we have alleged in paragraph seven that the Government had appropriated this land by removing the sand and gravel, prospecting, and so forth, and this is a part of those acts of appropriation. While we allege that it was also appropriated in 1940, we have also alleged in the alternative that it was appropriated by acts of removing the gravel, and that is just what I am endeavoring to show here. Now, at the time, whenever it was appropriated, that is when it ceased to be open for the mineral entry of the defendant.

The Court: Well, it makes no difference whether it was open or not in 1948. The only question is whether it was open to mineral location at the time he made his location. In other words, you are not trying to prove every link in a chain of title here, or anything like that, so that you have [15] to go back all these years. You can show in a general

(Testimony of Chester A. Archbold)
way, for instance, that they used the tract of land or what they did there just in a general way, but to go into specific accounts of contracts and all that, why, it is just immaterial. You don't have to show that in order to maintain your contentions here.

Mr. Baskin: But, if that is a part of our proof of the possession, why, we have to show that.

The Court: But you don't have to go back three years to show possession. It is possession at the time or immediately preceding the time of the location that is material here, not anything three years back. You don't have to go back that far. The Government isn't under any burden here to show continuity of possession.

Mr. Baskin: But, if the land was appropriated in 1948 for the purpose of building roads, then it ceased at that time to become open for purposes of filing mineral claims.

The Court: You can show that, as I say, in a general way by showing it was appropriated and used, but you don't have to bolster it up by showing how it was appropriated and used. That is a matter for cross-examination.

Mr. Baskin: Very well.

The Court: Of course even then evidence of appropriation in 1948 is immaterial unless you can show continuity.

Mr. Baskin: Well, may it please the Court, I am [16] planning to bring it right up to date with

(Testimony of Chester A. Archbold)
other contracts, showing other contracts subsequent to 1948.

The Court: You may do that in a general way, but there is no use of cross-examining your own witness. Leave that up to your opponent.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): In 1948 then one of the contractors for the Forest Service did remove, I believe you said, about 15,369 cubic yards of gravel?

A. That is right.

Q. And was that in the area now claimed by the defendant?

A. That was all in the area claimed by the defendant.

Q. Did any other contractors for the Forest Service remove sand and gravel from the area claimed by the defendant?

A. There were three other claims or contracts: Almquist's contract on October 25, 1949; Berg again on June 28, 1950.

Q. How much gravel did Mr. Almquist remove?

A. He removed 6,654 yards.

Q. How much gravel did Mr. Berg remove?

A. 8,215.

Q. And when did Mr. Berg perform his contract? Do you remember the period of time covered by his removal of the sand and gravel?

A. The last one?

Q. Yes. [17]

A. Starting June 28, 1950, and continuing on through into December of 1950.

(Testimony of Chester A. Archbold)

Q. Now, in addition to those contracts did anybody else remove gravel out there under the contract with the Forest Service?

A. Thomas Construction Company, during 1949 and 1950.

Q. How much did that company remove?

A. A total of 900 cubic yards.

Q. Now, was all of the gravel removed by Mr. Almquist and Berg Construction Company and the Thomas Construction Company removed from the area claimed by the defendant?

A. That is right.

Q. Those contracts you mentioned, state whether or not those were with the Forest Service and whether they were for construction of Forest Service roads.

A. They were entirely for construction of minor roads by the Forest Service.

Q. Do you know whether or not the Bureau of Public Roads removed any gravel from the area claimed by the defendant while your contractors were removing gravel from that area?

A. They did. They obtained gravel from Whipple Creek Pit during the time that our contractors were working.

Q. That would be then between 1948 and December, 1950? A. That is right. [18]

Q. Do you know about how much they removed from the area claimed by the defendant?

A. I have no figures for that. It would be just

(Testimony of Chester A. Archbold)
an estimate—between twenty-five hundred and three thousand yards or more.

Q. Are you—strike that. Did the Bureau of Public Roads ever request the Forest Service to set any land in the vicinity of Whipple Creek aside for their use in constructing highways?

A. They did.

Q. When did they first, or when did they first, may I say, formally approach the Forest Service by letter; do you know?

The Court: Well, I think it is not when they first approached the Forest Service, but what did the Forest Service do?

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Do you—state whether or not on or about January 31, 1951, the Bureau of Public Roads filed with the Forest Service a request for setting the land aside, the thirty-seven acres of land aside, for use of the Bureau of Public Roads?

A. The Forest Service received such a letter on that date; yes.

Q. Did they receive a map which showed the boundaries of [19] that thirty-seven and a half acres of land? A. They did.

Q. Now, what did the Forest Service do in connection with setting that land aside?

The Court: Well, it isn't all the details that they might have gone to to set it aside. Just ask him, did the Forest Service set it aside.

Mr. Baskin: Very well.

(Testimony of Chester A. Archbold)

Q. (By Mr. Baskin): Did the Forest Service set that thirty-seven and a half acres of land aside for the use of the Bureau of Public Roads?

A. We did.

Q. And what was the purpose of setting that land aside for their use?

A. To obtain a supply of road-building materials for construction and maintenance of forest highways and forest road development projects.

Q. Now, when did they do that? When did the Forest Service do that, or when did the Forest Service set that land aside?

A. On February 9, 1951, by Correction Memorandum No. 11.

Mr. Stump: If the Court please, I don't wish to object, but we have agreed on the letters. They can be admitted and they speak for themselves, but we have agreed to the letters. [20]

The Court: Well, you shouldn't duplicate by oral testimony anything that is already agreed or stipulated to. Just put it in evidence; that is all.

Mr. Baskin: Very well.

The Court: The facts to which you have agreed or which have been stipulated, are they embodied in any writing?

Mr. Baskin: Only in requests for admissions and their answers, and I think this one has.

Mr. Davidson: The letters we agreed to.

The Court: Well, are they a part of the record at the present time?

Mr. Davidson: They are not.

(Testimony of Chester A. Archbold)

Mr. Baskin: My understanding is that you have admitted that the Forest Service set the land aside; did you not?

Mr. Davidson: The Forest Service issued a Correction Memorandum.

Mr. Baskin: Very well. We have filed in the proceedings of this case in connection with the preliminary injunction a certified copy of the Correction Memorandum dated February 9, 1951, and I offer that as an exhibit, may it please the Court. It is in the file of this case already.

The Court: Well, you mean that is something that, although it is in the file, you cannot agree upon?

Mr. Stump: We have agreed on it. [21]

Mr. Davidson: We have agreed on it.

Mr. Baskin: I am offering it as evidence at this time.

The Court: If you have agreed on it, you needn't offer it in evidence. I can just take note of it. You have just called it to my attention. It is in the file and it is dated February 9, 1951, and called a Correction Memorandum.

Mr. Baskin: No. 11. It was attached to the motion for preliminary injunction.

Q. (By Mr. Baskin): Now, Mr. Archbold, will you describe the area of this 37.5 acres of land over which the Forest Service has removed sand and gravel? Tell the Court about how long the creek is, that is, over what area it has been removed, its width, its length and the depth.

(Testimony of Chester A. Archbold)

Mr. Stump: May it please the Court, this is merely a suggestion. We have agreed on a map showing the original ninety-one acres, the present thirty-seven and a half acres and the gravel plant.

Mr. Baskin: But we need to show here the area actually that was mined.

The Court: I suppose what you have in mind is showing how much or whether gravel was removed from this claim?

Mr. Baskin: That is right.

The Court: Well, you may ask him that, and it would [22] be better to ask him, to call his attention to the claim rather than to both sides of the creek which may or may not be in the claim.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): You are familiar with the location of the defendant's claim, are you not, Mr. Archbold? A. I am.

Mr. Baskin: May it please the Court, I would like to place this on the board just for illustrative purposes.

(Placing a chart on the blackboard.)

The Court: Well, is it going to serve some purpose now?

Mr. Baskin: I was just going to have him point out—I think, your Honor, in connection with some subsequent testimony in regard to the defendant's discovery.

The Court: Well, that may be, but in the meantime there is no use of asking him to point out

(Testimony of Chester A. Archbold)
anything that I can see from an examination of the chart myself in chambers.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Tell the Court over what length of an area of the defendant's claim that gravel has been removed by contractors and the Bureau of Public Roads.

A. Gravel was removed directly from a distance of about sixteen hundred feet up the stream and eighty to one hundred feet wide, indirectly by high water washing from [23] probably another eight hundred to a thousand feet above the contested claim, washing down and filling up the holes where gravel had been removed.

Q. Now, has the level of the bed of that creek been lowered by the removal of the sand and gravel? A. It has.

Q. And over that entire length of about sixteen hundred feet? A. It has.

Q. About how much has that bed been lowered?

A. It has been lowered from a few feet at the lower end to as much as fifteen feet at the upper end.

Q. Have you observed them digging holes or moving that gravel? A. I have.

Q. How deep holes have been dug in that area in removing gravel?

Mr. Stump: Just a moment. I didn't quite understand your question.

Q. (By Mr. Baskin): Tell the Court the depths

(Testimony of Chester A. Archbold)

of holes that you know were dug in that creek bed in removing gravel.

Mr. Stump: Just a minute. That he personally dug or was present when they were dug?

Mr. Baskin: No. That he knows were dug.

Mr. Stump: That would violate the hearsay rule if he wasn't there when they were dug. [24]

A. I personally——

The Court: He wouldn't have to be there while they were dug if he knows that they were dug under the authority of the Forest Service.

A. My duties took me there many times when they were operating in the pit, and I know that they removed gravel as deep as twenty feet below the surface of the water.

Q. (By Mr. Baskin): And did the stream then keep washing sand and gravel down?

A. Those holes were all filled up. They are filled up right now level.

Q. And from the top or the upper end of the defendant's claim, how far up the creek has sand and gravel washed down into the gravel pit?

Mr. Stump: If the Court please, I can't see any purpose of that question.

The Court: I think that what is overlooked here is he speaks of sixteen hundred feet up the creek and so on, but how do I know that that is on the claim?

Mr. Baskin: Well, I thought I laid the predicate for that in asking him—well, I will bring that out, may it please the Court.

(Testimony of Chester A. Archbold)

Q. (By Mr. Baskin): In describing the area as you just have, that sand and gravel was removed, was that on the defendant's claim? [25]

A. It was.

Q. All of that area is within the defendant's claim; is that correct?

A. All of the work of removing gravel by machinery was within the claim.

Q. And now——

The Court: Well, was there gravel removed by other means than machinery?

A. On high water periods gravel was washed from up the stream as far as eight hundred feet above their discovery point or the upper line of their claim in contest, washed down from up the stream.

The Court: Well, I don't think the Government could take advantage of that.

A. We did.

The Court: Yes, so far as getting a supply of gravel is concerned, but I mean so far as meeting the requirements of law here.

Q. (By Mr. Baskin): Well, the sand and gravel would flow down from about a thousand feet above the defendant's claim into the gravel pit; is that correct? A. That is right.

Mr. Stump: I am going to object to that. I did before, and the Court didn't rule on it. I don't still see the relevancy of that point. [26]

The Court: I don't either.

Mr. Stump: I ask it be stricken.

(Testimony of Chester M. Archbold.)

The Court: In other words—what do you claim for the testimony that the gravel was washed down into these holes?

Mr. Baskin: Well, may it please the Court, this is a preliminary question. It is showing this, that they removed gravel in one area which was at the upper end of the defendant's claim and that the water continually kept bringing sand and gravel down from a thousand feet up there. Of course we contend that that part of the creek was also appropriated although it is without the boundary of the Government's claim at this time.

The Court: Well, you contend then that it was something like a riparian right, that the Government was entitled to have the flow of gravel continue just the same as the flow of water?

Mr. Baskin: No; that was a use. Well, that is correct.

Mr. Stump: Then it is not pertinent at all if it was above defendant's claim. Now, I don't know why it should be in the record.

The Court: About all it does is to explain the fact that there was a continuous source of supply by reason of the gravel washing down and filling these holes. [27]

Mr. Baskin: Very well.

The Court: And that would explain or show that the use could have been more or less continuous because it was a continued supply, but other than that it has no relevancy.

Q. (By Mr. Baskin): Mr. Archbold, in remov-

(Testimony of Chester M. Archbold.)
ing this sand and gravel explain to the Court just how the water was used, that is, the movement of the water in connection with the removing of the gravel; how would it serve the removal of the gravel?

Mr. Stump: May it please the Court, I don't want to keep objecting, but I can't see its materiality.

Mr. Baskin: Well, here is my point, may it please the Court, that the persons removing the gravel moved the water from side to side at various times for the purpose of washing out the silt and exposing the gravel. I am just explaining the use of the water which, I think, is appropriate in connection with their removal of the gravel.

Mr. Stump: Well, then it is likewise inadmissible because Mr. Archbold admitted they had never worked out there.

The Court: Well, it wouldn't make any difference if he knew, but I don't see how the method of removal could be relevant here.

Mr. Baskin: You mean we can't show that it was removed by machinery and the way that it was removed?

The Court: Well, you can show it in a general way, [28] but shifting the creek back and forth and things of that kind, we might get down into detail here that would take a long time before the Court, and it doesn't serve any purpose.

Mr. Baskin: Well, here is the proposition. The way the Government has used that creek and the

(Testimony of Chester M. Archbold.)
way they contemplated using it is to have it moved back and forth to cover a very wide area which will cover virtually all of the defendant's claim within the thirty-seven acres.

The Court: Well, you can show the extent of the use, but you needn't go into details.

Mr. Baskin: Very well.

Q. (By Mr. Baskin): Were there any improvements made on the defendant's claim by the Government or its contractors? A. There were.

Q. Tell the Court what they were.

A. Well, over a thousand feet of roadway and a log loading ramp.

Q. Now, does that roadway parallel the gravel pit? A. It does.

Q. And who built that road?

A. Both Almquist and Berg Construction Companies.

Q. Now, tell the Court whether or not the Bureau of Public Roads with their personnel has maintained or improved that road.

A. That I couldn't say. The Bureau of Public Roads, they had [29] trucks in there and they hauled gravel out on their own operations, but I wasn't there when they were doing it.

Q. As far as you know, it was constructed by the contractors for the Government?

A. That is right.

Q. And what kind of a ramp was left there?

A. A log loading ramp whereby a bulldozer

(Testimony of Chester M. Archbold.)

would shove gravel up the ramp, through a hole and load trucks by gravity.

Q. And was that left there for the use of the Forest Service and the Bureau of Public Roads by the contractor?

A. It was placed there by one of our contractors. We paid for it by the gravel removed, and we requested that it be left there for our use.

The Court: Well, was all this roadway in the area claimed by the defendant?

A. All of the roadway is in the claim; yes, sir.

Q. (By Mr. Baskin): And is that ramp within the claim? A. It is.

Q. Do you know when the defendant posted notices of his claim? A. Yes, I do.

Q. When did he do that? I will strike that; just a moment. We have agreed upon that. Now, when did you learn about that?

A. I learned about it on, I believe, June 26, 1951. [30]

Q. And what did you do about it?

A. Well, Mr. Stump called at my office and told me about it, so I immediately went out to see if it was so.

Q. And did you ever examine the area of his claim, his post and discovery post and his corner post and so forth? A. I did.

Q. When did you do that?

A. My first inspection was on the evening of June 26th. I located the blazes at the lower end of his claim. The next day in company with W. A.

(Testimony of Chester M. Archbold.)
Wood of the Bureau of Public Roads, we located corners three and four; that was on the 27th, June 27th. I visited the claim a number of times, but on November 7, 1951, I traced out every foot of the claim, made notes on the existing corners, to see whether it was properly located.

Q. Now, did you ever examine his discovery post? A. I did.

Q. When did you do that?

A. A number of times. I don't have the date here right now, but on November 7th I did, of 1951.

Q. Now, Mr. Archbold, with reference to the area from which Government contractors removed sand and gravel, tell the Court where the discovery post is located.

A. The discovery post is located at the upper end and maybe a few feet over the boundary of our thirty-seven-and-a- [31] half-acre claim. It is pretty hard to determine just how far it is there.

Q. It would be only a few feet, if any?

A. Just a few feet over.

Q. Now, tell the Court whether or not you have made any improvements or removed any timber up above his discovery post for the purpose of removing or assisting in the removal of gravel in that area.

Mr. Stump: I object to that question. That is not in issue. We are not claiming that.

Mr. Baskin: May it please the Court, I am showing that that discovery post is within the area in which the Government has removed sand and

(Testimony of Chester M. Archbold.)
gravel, and the improvements are what the Forest Service has done for the purpose of facilitating the removal of that sand and gravel.

Mr. Stump: They haven't deemed it very important, your Honor, when they don't even include it in the withdrawal. It is even outside of the withdrawal area.

The Court: The fact that it is not in the withdrawal area is immaterial. It is evidentiary here in support of their contentions. Objection overruled.

A. The contractor felled timber above, probably fifty feet above, this discovery point. He had his bulldozer within fifty feet of it to divert the stream and cut across to break down the southeast bank of the stream for development [32] work. The corners were blazed between some of these stumps.

Mr. Stump: Now, if the Court please, as a matter of record, this contractor, I don't know who he means.

A. When I talk about the contractor, it is always the Forest Service working on one of our approved Forest Service contracts.

The Court: That is what I assumed it to be, otherwise it would be immaterial.

Q. (By Mr. Baskin): And then timber was removed about fifty feet above his location, his discovery point; is that right?

A. That is right.

Q. Now, in connection with the removal of that

(Testimony of Chester M. Archbold.)

sand and gravel, state whether or not that discovery was made on the land as it originally existed.

A. It was not as originally existed.

Q. Well, now, tell the Court the difference then.

Mr. Stump: May it please the Court, I can't see the materiality, unless counsel contends that discovery must be made on land in its original shape, whatever that was, whatever time, because that is not the law. Now, I don't see—it is our point—I wouldn't care who went in and uncovered the area; if they weren't in possession, or it was abandoned, we can go in and claim their discovery. Now, I believe counsel [33] will agree that is the law. Then what is the purpose of this?

The Court: Well, he contends here that there was no valid discovery, and I suppose that he intends to show something in support of that contention, and, of course, he must be allowed to do it. I can't shut him out. Objection overruled.

Mr. Stump: I assume then that this was meant as preliminary to prove lack of discovery of the mineral we claim was there. Is that the point?

The Court: I don't know how it could be relevant for any other purpose. Go ahead.

Q. (By Mr. Baskin): Tell the Court the difference in that area where his discovery post was located as it originally existed and as it existed at the time he erected his discovery post.

Mr. Stump: I want to object for the record, your Honor.

The Court: Objection overruled.

(Testimony of Chester M. Archbold.)

A. By removing the gravel below this point, high water washed down gravel to fill it, and these stumps, gravel was washed from under them and they just settled down there to their present location. The location must be all of five to six or more feet from what it was before we started to work there.

Q. Well, those stumps—— [34]

The Court: You mean the level of the ground had been lowered?

A. That whole area there, in and around this discovery point, had been lowered at least five feet.

Q. (By Mr. Baskin): And are those stumps, that you are speaking of, the stumps that were caused by cutting of the timber for the purpose of removing that gravel in that area?

A. We had planned to go farther up stream to take out more gravel, yes, in developing the whole area.

Q. Now, when you examined his discovery post, state whether or not you observed a notice there of any kind.

Mr. Stump: If it please the Court, I would like the witness to state at which time he has reference to. He said he went out there in June and also on November 7, 1951.

The Court: Of course that is a matter for cross-examination.

Q. (By Mr. Baskin): You may answer the question. When did you first see the discovery post?

A. On August the 2nd; I won't say it is the first

(Testimony of Chester M. Archbold.)

time that I saw it. On August 2, 1951, in company with six other men, I inspected the location notice.

Q. And tell the Court the condition of that or what that notice said and whether or not it was signed by the locator. [35]

A. The location notice was a standard placer claim location giving the description of the claim, and it was a typewritten notice. The locator's name was typewritten on it as was his witnesses in one case and printed by ink in another, but no handwriting in longhand signature.

Q. Now, tell the Court the height of that discovery post.

A. As I recall, it was about thirty inches above the ground.

Q. What was its dimensions?

A. It was two and a half by two and a half inches, planed post.

Q. And what did the discovery——

The Court: You said it was planed?

A. It was a piece of planed stake. It started out with probably a three by three and it ended up two and a half inches square.

Q. (By Mr. Baskin): What did that discovery post have marked on it, if anything?

A. Discovered June 21, 1951; H. F. Schaub, Locator; and it had the distances from all around giving the distances to circumscribe the whole plat; 450 feet southeast from Discovery Post to Post No. 2; thence 1300 feet southwest to Post 3; 600 feet northwest to Post 4; 1300 feet northeast to Post 5;

(Testimony of Chester M. Archbold.)

thence 150 feet southeast to Discovery Post; and marked on it was Whipple Creek, Placer Creek, [36] Placer No. 1.

Q. Did you examine the boundary lines?

A. I did.

Q. Tell the Court the condition of the boundary lines.

A. The upper boundary line between Corners 5, 1 and 2 is plainly marked. The lower boundary line between Corners 3 and 4 is plainly marked. The two side lines, you have difficulty to follow the lines without considerable searching back and forth to find the blazes.

Q. Did you examine Post No. 2?

A. I did.

Q. Tell the Court the height of that one and its dimensions.

A. It is a two-and-a-half-inch by two-and-a-half-inch post, thirty-two and a half inches above the ground.

Mr. Stump: What was the last?

A. Thirty-two and a half inches above ground.

Q. (By Mr. Baskin): Did you examine Post No. 3? A. I did.

Q. Tell the Court the condition of that post or the dimensions of it and anything it had written on it.

A. Two and a half inches by two and a half inches, twenty-eight inches above ground. It is marked Post No. 3, Whipple Creek Claim No. 1. The distances between corners may have been on the post but they are so indistinct you can't read them; I couldn't on that date. There is a notation

(Testimony of Chester M. Archbold.)

also there on that post in indelible ink: [37] "Visited here and also Corner No. 4 this date, 6/27/51, at 11:26 a.m."; the initials "W.A.W. and C.M.A."

Q. Do you know whose initials those are?

A. W.A.W. is for William Wood of the Bureau of Public Roads, and C.M.A. is myself, Archbold.

Q. Did you examine Post No. 4? A. I did.

Q. Tell the Court the height and dimensions of that post.

A. Two-and-a-half by two-and-a-half-inch post, twenty-nine inches above ground. It is marked Post No. 4, Whipple Creek Claim No. 1. There are no distances placed on that post.

Q. Now, did you examine Post No. 5?

A. I did.

Q. Tell the Court the——

A. Two-and-a-half by two-and-a-half-inch post, thirty-two inches above ground. It is marked Post No. 5, southeast 150 feet to Post No. 1 and southwest 1300 feet to Post No. 4. There is no claim name or number on that particular post.

Mr. Baskin: You may examine the witness.

The Court: I think we will recess now.

(Whereupon, Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon, the witness Chester M. Archbold resumed the [38] witness stand and the examination was continued as follows):

Mr. Stump: Mr. Davidson will cross-examine the witness.

(Testimony of Chester M. Archbold.)

Mr. Baskin: I would like to ask a few more questions, may it please the Court.

Q. (By Mr. Baskin): Mr. Archbold, was all the gravel that was removed from that gravel pit you have described under the authority of the United States Forest Service? A. It was.

Q. And is the defendant's claim within the ninety-one acres that was set aside as a public service site on or about September 3, or 11, of 1940?

A. It is entirely within that area.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Davidson:

Q. You say the gravel washes down the hill?

A. It washes down the stream bed.

Q. And fills up the pits as they are dug?

A. It does; yes.

Q. What happens? Does gravel come down the stream continuously?

A. Evidently on high water it would wash on down to the bay.

Q. And how big a deposit is there in the [39] bay then?

A. There is a large deposit down in salt water; yes.

Q. As large or larger than Whipple Creek?

A. I wouldn't say that; no.

Q. No overburden on it?

A. Not on salt water; no.

(Testimony of Chester M. Archbold.)

Q. It is a very substantial deposit?

A. It is.

Q. And the Government owns that?

A. Well, I would say it belongs to the Government below mean high tide and above mean high tide, too.

Q. On that map over there, that shows the ninety-one acres and the water line, does it not?

A. No, it doesn't. That just shows the thirty-seven-and-a-half-acre area.

Q. I am sorry. We have a map that shows all of this property—this map.

A. That shows the entire ninety-one and a half acres which includes the thirty-seven and a half acres and also the beach.

Q. This other substantial deposit which you say is down here at the mouth of the creek——

Mr. Baskin: Well, may it please the Court, I don't see the relevancy of any other deposit.

The Court: I don't either.

Mr. Davidson: The questions are in good faith, your [40] Honor; on the grounds that we are trying to get money out of the Government by obtaining the only gravel source available, I am just showing here that there is a source of equal size and use and equal distance from the road, on the other side of the road, owned by the Government.

The Court: Well, I think that the bearing of that on the question of good faith is so slight as to have very little evidentiary value.

Mr. Davidson: Well, it is only because counsel

(Testimony of Chester M. Archbold.)

in his opening statement said that it was an attempt to get money out of the Government and, therefore, not in good faith, and I think it is quite valuable to show that, if the Government owns another deposit of gravel an equal distance from this road, just on the other side of it, that Mr. Schaub couldn't possibly attempt to get money out of the Government, at least no more, couldn't charge them any more than it would cost them to go down at this other pit.

The Court: But the fact that there are half a dozen other places available wouldn't preclude the Government from taking the position in this case that the acts of the defendant are not in good faith. In other words, the position of the Government, as I understand it, is that they have gone on this area and appropriated after a certain fashion and have done certain acts on it. Now, that is the basis of the claim of lack of good faith, so it is immaterial what is done at the [41] beach.

Mr. Davidson: Well, if counsel concedes that it is not an attempt to hold up the Government, why, I would agree with that.

The Court: Well, it is not necessary for him to make any such concession. I don't think it is—it is the position that the Government takes, and there is no reason, or the Court really hasn't any power, to make him relinquish that position. He has a right to maintain his position and theory.

Mr. Davidson: I just brought it up because he did assert that position.

Q. (By Mr. Davidson): Then next, the dis-

(Testimony of Chester M. Archbold.)

covery post is outside the bounds of these thirty-seven acres, is it not?

A. As near as it can be determined, it is several feeet over the line; yes.

Q. The Forest Service made that survey, did it not? A. The Bureau of Public Roads.

Q. And the discovery post is outside the boundaries of that survey? A. Yes.

Q. Now, in getting back to the gravel washing down, when a contractor dug the gravel out, the next flood filled that hole up, I take it?

A. It did; yes. [42]

Q. What evidence remained on the ground that it had even been used?

A. By breaking down the stream bed, widened the stream bed to its present width of eighty to one hundred feet wide. It was only fifteen feet to start with when we started in there.

Mr. Davidson: Your Honor, this is a stipulation as to what witnesses will testify, if called, chiefly contractors.

The Court: Well, you want to—is that stipulation made a matter of record in the case?

Mr. Baskin: I haven't looked at it. I assume it is correct. I directed the typing of it. I haven't read it. I don't know what purpose he has in mind.

Q. (By Mr. Davidson): You testified as to the removal of the gravel by the contractor Berg?

A. Yes; I testified that he moved gravel on two separate contracts.

Q. Now, isn't it true that he took that gravel

(Testimony of Chester M. Archbold.)

from the bed of the stream and did not remove any overburden?

A. No. He removed lots of overburden. That is what almost broke him to start with.

Q. Well, then when he says: "Well, good gravel was found in all pits. The cost of clearing, grubbing and removal of timber and overburden was too high for the amount of gravel needed for this contract. We, therefore, concentrated [43] on gravel removal from the stream bed."

A. After he found that he had too much overburden to remove, he put the stream to work for him.

Q. That is right. And he progressed upstream through the stream bed, or did he?

A. He followed along the stream bed with the road and tried to keep it on the upland and out of the stream, but high water would wash it, and he had to swing his road as to where the stream left available land to work on.

Q. Well, then did he take—you say he stopped removing overburden after a little while?

A. Yes, he did. He allowed the high waters to undermind the creek banks and beds and wash out the overburden.

Q. And when did he finish that contract?

A. I will have to refer to my notes here as to when. He had two contracts.

Q. That is right.

A. One on July 27, 1948, which was completed in

(Testimony of Chester M. Archbold.)

1949, and his second one from June 28, 1950, which was finally completed the spring of 1951.

Q. Well, this statement here refers to the one he finished on June 30, 1949, and this is the one in which you testified he moved 15,369 yards of gravel.

A. That was the first contract.

Q. That is the largest single contract removal that has ever [44] been from there?

A. That is right.

Q. He did that in June, 1949, and, as you say, he took some overburden and then he went into the stream bed and didn't take any more overburden. What happened that winter? More gravel washed down the stream? A. Sure; sure, it did.

Q. And did it fill up the stream again?

A. Filled it all up again.

Q. What evidence was there that Berg had ever been there?

A. His road was still there alongside the bank.

Q. The road was alongside; but looking at the stream there was just no evidence that anybody had taken gravel out? A. Oh, certainly.

Q. It was full of gravel again?

A. But in the meantime it had lowered the stream bed as much as fifteen feet by filling these holes there, so it was plainly evident that somebody had been in there. You couldn't get out of it. The stumps were all along both sides that he had cut to clear. He had to remove not the overburden but he had removed timber which were undermined, and the stumps were undermined, and he had to pull

(Testimony of Chester M. Archbold.)
them out and windrow them on the other side of the stream outside of his road.

Q. There was no evidence from the overburden; there was no [45] evidence outside the banks of the streams, except that the stream was deeper and gravel was exposed on both sides?

A. As I said, the original stream bed was clogged with downed timber for hundreds and hundreds of years, roots and stumps that confined it in one channel about fifteen to twenty feet in width. After Mr. Berg finished that contract, it was as much as eighty feet wide. Anybody could see that somebody had been in there.

Q. And what cleared the stumps out of the stream?

A. The stump cuts were still there on timber that he had to take the timber out and get rid of it. He burned some and windrowed the rest, and it is still there. Anybody can see that.

Q. This road, he constructed that for the Forest Service, you say?

A. We laid out the route of the road as to where it would be accessible to the Forest Service in developing that gravel pit. We discussed his efforts there.

Q. The contract provided: "A service road from highway to pit will need to be constructed by the contractor without remuneration for such things as his needs require."

A. It stated that he would be required to build a road in there to remove the gravel at his bid price

(Testimony of Chester M. Archbold.)

of the gravel removed. That is how we paid for the road.

Q. But for whose needs was the road [46] built?

A. It was built for the Forest Service.

Q. The contract says "his needs." Speaking of the contractor, it means the Forest Service?

A. That is right. That is the way I construe it. Any of the contractors working for us, it is the same as if the Forest Service did the work. That is the way we consider it.

Q. Mr. Berg also says: "During late summer of 1949 we moved approximately one thousand cubic yards of borrow fill and surfacing from the Whipple Creek pit for a number of driveway approaches extending from Wards Cove to Clover Pass."

A. That is right. He took gravel out of there.

Q. Was that a Forest Service contract?

A. That was not a contract; no. He took that out while his equipment was still there under free use with just verbal permission to do that.

Q. You permitted him to do that?

A. That has been our policy in all of the gravel pits that we have opened up.

Q. To give free use to settlers?

A. To develop driveway approaches, gardens, foundations or any way to develop the land alongside of our roads, they are entitled to free use of both gravel and timber or earth or whatever they want to move, rock. [47]

Q. Did you inquire of Mr. Berg of how much he charged for that gravel from the people he sold it to?

(Testimony of Chester M. Archbold.)

Mr. Baskin: Well, I object to that, your Honor. I don't see that that is material.

The Court: Objection sustained.

Q. (By Mr. Davidson): That was during the period while his own equipment was already in there, was it not? A. That is right; yes, sir.

Q. Getting back to the recreation area classification, you testified that there were five hundred, that there was some work done there in 1940. What has been done there since 1940 for recreation use?

A. The only work that we would have any record of there during that period after the C.C.C. worked there was the visitation of the area by our forest guard and the forest ranger and the foreman of construction who would look in there during that period. That is part of their work on all the recreation areas. It was classified as a recreation area, so it was part of their duties to call in and look at it. There would be no record other than that.

Q. Do you have any such record as that?

A. We wouldn't; no. Every time they drove out the road we would just have a mileage record or their monthly mileage report.

Q. Was there any further cutting of [48] trails?

A. No. We did enough during that period with those fifty men in the short while they were there to do what we wanted to do.

Q. And those trails stayed open ten years?

A. They are still there. The timber, the cordwood is still piled up along those trails.

Q. The wood that was cut ten years ago?

(Testimony of Chester M. Archbold.)

A. It is still there, some of it.

Q. Yes; and nobody used it; scarcely anybody used it in ten years?

A. Oh, no. I would say that the most inaccessible is still there if they didn't pack it so far, but they burned up the most of it.

Q. Now, during this use as a gravel pit, this road, there was a great deal of machinery in that area, was there not?

A. During the various times; yes.

Q. While it was being operated as a gravel pit?

A. Yes.

Q. And which the Forestry Service regards as continuously operated as a gravel pit? A. Yes.

Q. During the periods when there was equipment running in there, trucks going back and forth on the road, I take it there were very few people having picnics there?

A. On Sundays I have been out there and target practice was [49] being carried on at the gravel bunker. Targets were there every Monday morning when the crew went to work, so they were using it, and picnic fires were there.

Q. The gravel pit is part of the picnic area and used both for recreation by the public and for mining gravel by the contractors?

A. The kids went up there, after the gravel was washed down and left windrows of fine sand, and took over that gravel pit for recreation purposes on Sundays and when there was no work going on.

Q. There has been no further expenditure of

(Testimony of Chester M. Archbold.)

funds for labor on that area since 1940, however, for development as a recreation area?

A. Not as a project; no; just by guards. Our guard, who is on during the summer to look after fire, our recreation guard would call in there and see if there was any picnic fires left burning. We would have no record of that, no, of every instance of his visitation.

Q. No; but there has been no further cutting of trails? A. No.

Q. No further labor put in or money put in to develop it into a recreation area?

A. That is right.

Q. This regulation, Plaintiff's Exhibit 1, Regulation U-11, Free Special Use Permits, Section J, is that the basis for [50] the letting of these contracts?

A. No. We consider that land as Forest Service land to use as we see fit.

Q. That is the land itself?

A. The land and the gravel, the contents of it. It was sand. If it was suitable for road-building purposes and we wished to take that from any of the National Forest Service land, why, we would take it.

Q. Well, what does this next section—"Material of this kind will not be permitted free to contractors if the terms of the contract require the contractor to furnish all materials, since in such cases the contractor has figured the expense of purchasing material and to grant free use would be inconsistent with the purpose of this regulation."

A. In our contracts it is provided that they take

(Testimony of Chester M. Archbold.)

their gravel there free of charge. It was to be put on a Forest Service project, and there would be no sense in charging the Government to take its own property to place on another road.

Q. Is this the contract?

A. That is the one that is signed by Berg Construction Company. That is the one.

Q. Calling your attention to Article 1 of the contract, what does that say? [51]

A. "Article 1. Statement of Work. The contractor shall furnish the materials and perform the work for grading and surfacing 1.64 miles of South Point Higgins Road with spur at Ketchikan, Alaska."

Q. Now, does that fit in at all with this regulation? The regulation says——

Mr. Baskin: Well, your Honor, I object to any further questions along that line.

The Court: Well, I don't think the Court is concerned with any consistency or inconsistency between the regulations and the contracts or anything else. The only question, as I see it, is whether there was anything done out there even though it is only under color of a claim of right. It doesn't have to be one hundred per cent legal or anything of that kind or consistent.

Mr. Davidson: Well, your Honor, I feel the rule of law is that Congress could only dispossess us of the lands of the United States, and it must be under the authority of Congress.

The Court: This doesn't go to the disposal of it.

(Testimony of Chester M. Archbold.)
This goes just to certain uses made of it. The fact that you might be able to point to some inconsistency between the regulations and what was done with it is something that the Court is not going to consider here.

Mr. Davidson: This regulation of free use [52] permits is the regulation which appropriates this land for the Government use, this designation as a recreation area. The Forest Service takes the position when there is a recreation area that there cannot be a mineral claim to such an area.

Mr. Baskin: Well, I object to that, may it please the Court. The witness has only testified to the appropriation or acts of appropriation by the Federal Government.

Mr. Davidson: He testified to the classification too, your Honor.

The Court: Well, but you are asking him now to express an opinion on a legal question which is for the Court. The Court isn't interested in what opinion he may have.

Q. (By Mr. Davidson): On this prior mineral claim, what basis was that claim contested on?

A. That was contested for the simple reason that we had our plans to develop that as a recreation area. It hadn't been set aside, but we were working towards that end. We maintained that he did not have a mineral claim there under a placer designation, and it was proved that he didn't.

Q. Because there was no gold there?

A. Yes. He proved gold and that is all he

(Testimony of Chester M. Archbold.)

proved, and we proved that he didn't have it there. The claim was declared null and void, the two of them.

Q. Now, in this discovery post of Mr. Schaub's was there [53] gravel there?

A. There is gravel inside. I will not say that there isn't, because I have a picture showing some stones there, which gravel is pretty hard to say how big it can be before it isn't gravel.

Q. Is gravel at the discovery post?

A. In and around and amongst the roots of this stump that the post was placed in; yes.

Q. Have they classified any areas in this Tongass Forest as wilderness areas?

A. Not as wilderness areas.

Mr. Baskin: I object unless he is contending that this area here has been classified as a wilderness area. Whether other areas have been classified as wilderness areas should be immaterial.

The Court: Yes; I think so.

Mr. Davidson: Well, your Honor, I think we are coming to a point which we feel is very material in this case particularly on the grounds of this appropriation by classification. It is, I think, an extremely serious thing for the forests, which is virtually all of Southeastern Alaska, if a classification constitutes an appropriation for mineral purposes, and I am now prepared to show that the regulations of the Forestry Manual provide that areas which may be valuable for minerals when it is developed,

(Testimony of Chester M. Archbold.)

its potentials should be [54] classified as recreation areas since that is the best way——

The Court: Should be what?

Mr. Davidson: Should be classified as recreation areas since that is the best protection the Secretary of Agriculture can afford against a mineral entry; and I will further show that the same regulations, shortly thereafter, point out that the only way you can protect against a mineral entry is by withdrawal through the Secretary of the Interior. I can't explain the first paragraph in the regulation. It just doesn't make any sense to me, but it is there, and it clearly does influence regional foresters, which, I believe, was the case here, and I would like to show that regulation.

The Court: If it is a regulation, the Court can take judicial notice of it.

Mr. Davidson: Well, it is not a regulation. It is part of the Forest Service Manual, which is the same thing as these are.

The Court: Is it in evidence?

Mr. Davidson: No. I will put it in evidence.

Q. (By Mr. Davidson): Are you familiar with that regulation, U-3 B?

Mr. Baskin: Well, your Honor, I don't see that that would be material unless it is shown it is, and I object to any further examination. The regulation, if it is a regulation, he could ask the Court to take judicial notice of it [55] and perhaps argue it, but as an evidentiary matter it is not material and is objectionable.

(Testimony of Chester M. Archbold.)

The Court: Yes; if it is a regulation, the Court will take judicial notice of it upon being asked to do so.

Mr. Davidson: This is not, however, a regulation, your Honor; at least it is not in the Code of Federal Register. It is, however, I think, a fact which illustrates most of the importance of this case and the view the Forestry Service itself takes of this claim of appropriation.

The Court: How is it cross-examination on anything he testified on?

Mr. Davidson: He testified it was classified as a recreation area.

The Court: What do you propose to show by this?

Mr. Davidson: I propose to show that was the form adopted to prevent a mineral entry.

Mr. Baskin: What was that?

Mr. Davidson: The form it was classified under, and it has, you might say, not been administered under it since there was no subsequent recreation.

The Court: Set aside as a recreation area for the purpose of keeping out mineral location?

Mr. Davidson: Yes. It is not a regulation.

The Court: It could be a regulation for the instruction of the Government or the Forest Service without [56] being printed in the Code of Federal Regulations.

Mr. Davidson: That is right.

The Court: But instead of referring to the regulation, ask him about it.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): Are you familiar with that provision of U-3 B——

Mr. Davidson: Your Honor, I had that this morning but I understood Mr. Baskin would bring it. I don't have it at the moment.

The Court: What do you want me to do about it?

Mr. Davidson: I would like a short time so I could get it.

The Court: I don't want to take another recess now. Can't you go on to some other phase of the case?

Q. (By Mr. Davidson): When was the day that you examined these posts and lines?

A. The one upon which I have a record is November 7, 1951.

Q. I understand all of the testimony you gave before was as of that date?

A. I testified that I visited the area a number of times but I didn't have the dates with me.

Q. This is the date you mentioned seeing the posts? A. That is right.

Q. How wide are these posts corner to corner, across diagonally? [57]

A. From Corner 5 to Corner——

Q. No. Each stake.

A. Two and a half by two and a half square, why, you can figure it out crosswise.

Q. A little over three inches?

A. If I had one here, I could say.

Q. You didn't measure it that way then?

(Testimony of Chester M. Archbold.)

A. No, I didn't measure it that way; no.

Q. And you said, I believe, that the lower lines 3 to 4 were plainly marked, easy to find?

A. Yes; from 3 to 4.

Q. And lines 5, 1 and 2 were plainly marked?

A. That is right.

Q. And that the location notice described the boundaries as 1, 2, 3, 4 and 5? A. Yes.

Q. And gave the courses and distances?

A. Yes.

Q. So you knew where to find boundaries, you were able to find both ends, and it is a straight line in between, isn't it?

A. I can testify the corner between 2 and 3, as blazed, is not a straight line. I followed it for about an hour and a half to try to find it to see if it was a straight line but it is not. [58]

Q. What obstructed it?

A. Evidently Mr. Schaub——

Q. What obstructed the view? What was in the way?

A. Regardless of how it is described, the marking on the ground is what we go by.

Q. I think the claim goes by the line between the posts. I want to know what was in the way of that line. A. Trees.

Q. You take the position that a mineral locator should cut down the trees on the line?

Mr. Baskin: I object to that.

The Court: It is nothing that would be of any assistance to the Court.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): What kind of trees would you have to cut down?

A. You would have to clear it out to make it distinct; huckleberry brush. We could have seen it.

Q. There was a blazed line through there though?

A. Yes. By considerable trouble I located the blazed line.

Q. What did you say it took you; about an hour? A. It took me all of an hour.

Q. In any event the upper and lower lines were clearly located?

A. That is what I testified.

Q. You didn't have any doubt as to where the line was between [59] those two posts; you knew where it was?

A. I knew. I visited them both. I visited all the corners so I knew just exactly where they were.

Q. And you knew actually where all four corners were from your first visit?

A. No, I didn't. I only found two corners the first visit.

Q. That was in the evening, that first visit?

A. And the next day. We were dressed in office clothes, so we put some of the surveyors to find it. We couldn't find it. There was no evidence at that time of side blazing or anything else to follow the claims, so whether the blazing was all done on the day the claim was first staked I don't know. I didn't find the location notices until June 28th.

Q. Had you looked for them before then?

(Testimony of Chester M. Archbold.)

A. Yes, I did. I didn't find them. By following the description I had I didn't find them.

Q. Now, on this second point, this area that was reserved, you said, on February 9th, you testified the procedure followed was that the Bureau of Public Roads requested this area be classified or reserved?

A. Yes. During 1950 the Bureau of Public Roads had done considerable work there to prospect and prove to them that the material was there in sufficient quantity to justify setting it aside for a major project. I had discussed [60] throughout the year with Mr. McCann and Mr. Wyller of the Bureau of Public Roads as to the suitability of the material, and they proceeded to prospect to assure themselves that there was sufficient there.

Q. You are familiar with the correspondence on that matter? A. I am.

Q. Well, let's get on back to another point. On the map there could you point out all of the areas where gravel has been taken?

A. The bridge is located right here. The crossing of Whipple Creek by the Tongass Highway is right here—no—that is a proposed new route; it is way up here. In building the approaches to that bridge gravel was obtained from this area, there, and from down in here.

Q. From where?

A. For the approaches to that bridge. There is quite a fill all the way around. That was in the

(Testimony of Chester M. Archbold.)
original construction of Tongass Highway to that point.

Q. Where did that come from; from the stream bed?

A. From the stream bed; yes. It was right in the stream. It was easy to get, so that is what they took, but they dug a hole.

Q. Did that hole fill up?

A. It filled up from up here. This stuff up here moved down.

Q. Is there any evidence of that 1934 removal left? [61]

A. Yes; by the stream bed being lowered and the roots showing and undermining of adjacent big timber. As soon as you commence to dig in the stream, work, why, there is evidence there. The next removal was the Coast Guard came in after the road was constructed—no. I will say there in the meantime—it hasn't been introduced here— we built another road. The Pond Reef Road takes off down here about a quarter of a mile. We built that road with this material out of here too. That has been skipped up, but it is in my notes though. And that further reduced the stream bed and dug a bigger hole, and we went up into here farther each time and then later on with the Coast Guard coming in and removing what they did washed from down, from as far as up here. Thence every removal kept proving the volume of gravel to be found there. In our contracts Berg was the first one that went in. At first there was a detour. It is still there, and

(Testimony of Chester M. Archbold.)

you can see it. It goes right down across here. The trucks moved across there around the proposed bridge in building those approaches, and they hauled gravel up each side, and that was the first indication. Then, when Mr. Berg went in, this road over here was still usable.

Q. Why did he have to build another one then?

A. He didn't build another one. He used the same one, only extended it up the creek. He just kept moving it up as [62] he needed more gravel. There is one big hole right in here that anybody can see. He removed a lot of overburden there. It was too soft so he was forced that he dug prospect pits way back over in here. He was forced then to stay to the stream bed here and work it regardless of the size of the timber along here, and he went up on the first contract to about this location, right in here. Mr. Almquist came then and extended the road he started and took all the gravel in the stream that was already developed and went on and extended way up to here. He felled the timber way back up in there. The original stream ran not where it is now but it went away over in here.

Q. Now, what would you call the developed area of this thing?

A. The developed area takes this stream bed here, over beyond the edge of the road, along here all the way, everything that is shown in the stream bed. That stream bed, where it is shown here, fluc-

(Testimony of Chester M. Archbold.)

tuates; it changes all the way across. I doubt if it is in that location right now.

Q. Is there any reasonable way—how would anyone find the boundaries of the developed area?

A. It is in plain sight.

Q. I know it is in plain sight, but you said right now it could be here or there.

A. No; I said the stream. The stream, it is doubtful if it [63] is in that exact location because there have been a number of freshets since we pulled out of there and the last contract came up.

Q. You called the stream the developed area?

A. I certainly do.

Q. And I asked you the other part of the developed area; did you say this?

A. Over to this.

Q. Is it this, or is it this?

A. Well, when you get right down to it, the whole area that shows anything whatsoever is developed. All these test pits here is developed. It is proving. It is prospecting. Any miner would say that that is so. In open pits, you can say that that is an open pit.

Q. Yes—the Forest Service.

A. We do when it is necessary to build roads.

Q. The Bureau of Public Roads were vitally concerned in the development of this pit, were they not?

A. No, I wouldn't say that they were vitally concerned any more than the Forest Service is.

Q. I mean, they are the ones who prepared that.

(Testimony of Chester M. Archbold.)

A. They prepared that plat; yes.

Q. Yes. Who did the prospecting and the digging of the holes there?

A. Those that are shown were dug by the Bureau of Public [64] Roads.

Q. And they asked that it be withdrawn for their use?

A. For a joint use; for the Bureau of Public Roads and for the Forest Service.

Q. They were fully familiar with that area, were they not? A. They are.

Q. And Mr. Wyller, was he familiar with that area? A. Yes, he is.

Q. Do you recognize that letter?

A. I believe I have a copy of that in my file.

Q. What does the last paragraph of that letter say?

Mr. Baskin: Well, may it please the Court, I don't see that the contents of the letters are material. He can testify as to what they did. So, I am going to object.

The Court: I don't either. What somebody else said is not material here, as I see it, on the cross-examination of this witness.

Mr. Davidson: I would just like to know whether Mr. Archbold agrees with Mr. Wyller when he said, "We also believe the area reserved should extend up the creek from the highway, taking in the gravel deposits now untouched and located above the present pit."

Mr. Baskin: Well, may it please the Court, now

(Testimony of Chester M. Archbold.)

he is getting as to the point of whether or not the pit should be extended a lot farther than what it is. That is just a [65] matter of opinion here. We are only asking for that that has been developed, and so——

Mr. Davidson: I can of course call Mr. Wyller to testify if that was his opinion when he made the thirty-seven acres——

The Court: That what was his opinion?

Mr. Davidson: That we believe it should extend up the creek.

The Court: Well, that is absolutely of no probative value here, what he believed.

Mr. Davidson: He was fully familiar with the pit.

The Court: It doesn't make any difference whether he was. His opinion, as I say, is of no evidentiary value on the questions before the Court.

Mr. Davidson: Well, Mr. Archbold testified or said it was developed all the way up and past the thirty-seven acres.

The Court: Well, if you have any witness, whether it is Mr. Wyller or anybody else, who will contradict Mr. Archbold on a material matter, you may put him on the stand.

Q. (By Mr. Davidson): Now, in getting to the thirty-seven and a half acres, what is the title of that thirty-seven-and-a-half-acre map? You say it is proposed for withdrawal; is it not?

It was; yes. That was proposed. We had to have a proposal [66] to start with.

(Testimony of Chester M. Archbold.)

Q. That is right. And then what was the next step?

A. The next step was to withdraw it as far as the Forest Service could on February 9, 1951, along that line. We had already withdrawn, as far as we could see, but this was just another step.

Q. The Bureau of Public Roads proposed that it be withdrawn, and then what did your office do?

A. We withdrew it by Correction Memorandum No. 11.

Q. That says it is withdrawn?

A. It was withdrawn immediately at that time.

Q. What area did that Correction Memorandum describe?

A. The thirty-seven and a half acres that are shown there.

Q. Isn't it true that it only described the area north of the highway?

The Court: Well, it is in evidence, the Correction Memorandum.

Mr. Baskin: It will speak for itself, may it please the Court.

The Court: Yes.

Mr. Davidson: I just wanted to find out if this witness knew that there was this discrepancy.

Mr. Baskin: Well, that at least covers the defendant's claim, and that is the only land in litigation.

Mr. Davidson: Yes; but I want to show how these [67] things are done.

(Testimony of Chester M. Archbold.)

Q. (By Mr. Davidson): Are you familiar with this letter?

A. I have a copy of it. I have the record right here in my notes.

Q. That withdrawal was that area "is hereby reserved," is it not, something in words to that effect? A. Yes.

Q. It is reserved. Now, this letter——

Mr. Baskin: Well, may it please the Court, unless it is shown that that relates to the case, I am going to object to the contents of it.

The Court: Of course I can't tell. I haven't seen the letter. And all I want to call attention to at this time is that I was led to believe that this hearing would only take a few hours, and it looks now like it will take a week.

Q. (By Mr. Davidson): Well, let me ask you if this letter was written by the Forestry Service and in connection with the thirty-seven-and-a-half-acre withdrawal?

A. That was one of the steps of withdrawal.

Q. That is right. And this letter was written four days after the Correction Memorandum?

A. What is the date of that?

Q. Well, it says—no, it was not. The original letter was dated two days before the Correction Memorandum, the covering letter? [68]

A. That is right.

Q. And the Chief Forester sent a form of letter to be executed by the Chief Forester in Washing-

(Testimony of Chester M. Archbold.)

ton directing a letter to the Bureau of Land Management——

Mr. Baskin: May it please the Court, the defense has admitted that the Forest Service forwarded that letter to the Bureau of Land Management, forwarded the amount and the letter requesting the withdrawal, between February 13th and March 8, 1951, so I don't see where that relates or is material, your Honor. They admitted that in the request for admissions.

Mr. Davidson: All I want to show, your Honor, is that at the date they issued the Correction Memorandum, saying the area is reserved, they wrote to Washington recommending that you withdraw this area.

The Court: Well, if it casts any light on when the area was withdrawn, why, of course you may go into that.

Q. (By Mr. Davidson): Then let me ask you this. Did the Forest Service recommend that the area be withdrawn at the same time it issued this Correction Memorandum for its local records, saying that it is withdrawn?

A. As I take it, that letter was written on February 7th; the Correction Memorandum was written on February 9th; that is the point you are trying to make?

Q. That they were simultaneously—they were part of the same [69] transaction?

A. That is right, sure; that is right.

Q. The chief officer or region officer here re-

(Testimony of Chester M. Archbold.)

served that area at the same time he wrote Washington asking Washington to reserve it?

A. To complete our land records. There was just that little lapse is all. It took time to do it, and that is the reason it is two days off.

Q. To complete whose land records?

A. The records of the Southern Division of the Tongass National Forest. I have to have that in my land records.

Q. Well, I am just trying to see why the Correction Memorandum says it is reserved, and at the same time you ask Washington to withdraw it?

A. Well, that is beside the point as I see it. The way and policy that we handle our lands records down there, that is just one step in it is all.

Q. But this letter to Washington has nothing to do with your land records down there?

A. Just to keep us advised of what is happening.

Q. Yes; but I mean, your land records, that is the way the Correction Memorandum went into your land records?

A. That is right; and we posted it immediately.

Q. And it says it is withdrawn?

A. It was withdrawn as of that date. [70]

Q. Did you know that this letter was going to Washington asking Washington to withdraw it?

A. Well, I did surmise that it was going there; sure. I didn't get it until a week or so later, but it is in our records down there.

Q. This letter?

(Testimony of Chester M. Archbold.)

A. That letter; sure. We have a copy of it.

Q. So, at the time you knew that the Chief Forester said he withdrew it he was writing Washington, asking Washington to do that very thing?

The Court: Well, I think—what I am interested in is not what appears to be an irregularity but what I am interested in is what act is it and on the part of whom that results in the withdrawal or reservation and whether or not the order withdrawing an area or reserving it relates back to the time of some administrative action.

Mr. Davidson: I think that that is a matter of law, your Honor, and I am quite prepared to argue that it does not and cannot.

The Court: Well, I am interested in hearing that before—I am interested in hearing of any irregularity like this. For instance, if an order reserving an area relates back to the time of the administrative action of the kind described here, well then it is immaterial that there is an apparent irregularity. [71]

Mr. Davidson: That is right. But the point, your Honor, is that it doesn't, and one of the very sound reasons why it doesn't——

The Court: Then you better examine him as to what is the act that finally consummates the reservation or withdrawal.

Q. (By Mr. Davidson): Do you know what is the act that finally consummates the reservation and withdrawal that was involved here?

A. Well, as far as I am concerned, the Correc-

(Testimony of Chester M. Archbold.)

tion Memorandum No. 11 stands as far as I am concerned down there in administering it. The final withdrawal was naturally when the Department of Interior withdrew the area.

Mr. Davidson: I think these two points come together as to this policy, provisions in the Bureau of Land Records, in that the local departmental officers apparently take the position that a Correction Memorandum by the Forester does reserve the land and from that day forth will keep mineral claimants out. It is, I believe, the law that the Secretary of the Interior's action is what does that, and there are innumerable slips between the cup and the lip there, which is a very sound reason for not permitting this sort of regulation to affect a mineral entry because, as you can see, it might go on for years.

The Court: Well, it all depends on what act it [72] takes to make the withdrawal reservation effective.

Mr. Davidson: That is right.

The Court: Well, then, when we determine that, all we need to do is determine the date when that act was performed.

Mr. Davidson: I agree with that, and I don't see how——

The Court: Well, then, let's get to that instead of all this intermediary stuff.

Mr. Davidson: Well, I don't see how I can prove it by evidence except other than the law.

The Court: Do you mean there isn't any proof

(Testimony of Chester M. Archbold.)
here of the act that you contend is what it takes to make a reservation?

Mr. Davidson: Well, they haven't proved it and they don't have to prove it. We admit an act of reservation some five or six weeks subsequent to our mineral entry. That was a proclamation by the Secretary of the Interior which withdrew thirty-seven and a half acres of land, not however—again a point to show that earlier acts are not effective—he did not withdraw it quite in the fashion requested by the Forestry Service. It is a small discrepancy.

The Court: Well, what is there to show the effective date?

Mr. Davidson: It is dated, I think, on its [73] face, as published, July 20th. I believe it was signed by Secretary of the Interior Chapman on July 25th.

The Court: When was it to take effect, on publication or issue?

Mr. Davidson: Publication, your Honor.

The Court: Well, then what is the use of going into this? If that is your position, just call attention to the fact that the reservation or the act of reserving it wasn't made by the Secretary until such and such a time.

Mr. Davidson: Well, the point is, your Honor, the Government has claimed all of these various alternatives. It seems to us we have to meet them all.

(Testimony of Chester M. Archbold.)

The Court: But the way to meet them is by showing what the Secretary did.

Mr. Davidson: Well, yes, your Honor; but what the Secretary did had nothing whatsoever to do with the classification as a recreation area, for instance. All I am trying to show is that this reservation, which is a separate allegation of the complaint and specifically mentioned as a particular reservation by Government counsel, is merely one step leading up to a reservation by the Secretary of the Interior, and that is what I was trying to show by these letters, that it is just such a step and has no independent force or effect of its own unless the Government——

The Court: Well, isn't that a matter of argument? [74] You can argue that at the completion of the case.

Mr. Davidson: It is a matter of argument to argue that the Correction Memorandum, which says on its face that the area is reserved, is only a step leading up to it. But I would like to show here that as the Forester was issuing that Memorandum he was sending a letter to Washington asking for this regular routine procedure.

The Court: As I say, I am not interested in what somebody wrote to Washington. I am interested in when the order or whatever it takes to make a withdrawal effective was done.

Q. (By Mr. Davidson): Do you know when that order was effective, the Secretary of the Interior's order?

(Testimony of Chester M. Archbold.)

Mr. Baskin: Well, your Honor, that is a matter of record which the Court can take judicial notice of in the Federal Register.

The Court: Yes. If it is in the Federal Register, all you need to do is to ask the Court to take judicial notice of it if it hasn't already been stipulated.

Mr. Stump: I think we did stipulate on it. It shows in the pleadings.

Mr. Baskin: Here is a copy.

The Court: Then that is all that is necessary. You have got all that you need in the record now to make the point on argument that you referred to a moment ago. [75]

Q. (By Mr. Davidson): In going back to this classification as a recreation area, this area was classified as a recreation in 1940, but no further money was spent on it for recreation use?

A. None, other than visitation by our forest guard to clean up the area and watch out for forest fires.

Q. It is recreation use, is it not, that it has been listed under?

A. It was to a certain point until we decided that the gravel was needed to develop other recreation areas and recreation roads. All of our minor roads have a recreation classification also.

Q. What I am trying to get at, is this area at the moment a recreation area, gravel pit and reservation for the Bureau of Public Roads all at once?

A. It is by various stages from 1940 to 1951.

(Testimony of Chester M. Archbold.)

Q. Well, at what point did it lose its character as a recreation area and become a gravel area?

Mr. Baskin: Well, I object, may it please the Court.

The Court: Well, what I am wondering about, is there any necessary consistency between the remainder of the area aside from the gravel pit that could not remain a recreation area? In other words, the fact that there is a gravel pit somewhere in the middle or anywhere in a recreation area [76] would not deprive the remainder of the recreation area of its classification, would it?

Mr. Davidson: No, I don't believe it would, your Honor, but, I think, the point I am trying to make here is that the reason, the only reason, I believe, that this area was classified as a recreation area was to prevent its mineral entry, and I think the facts here now show that there is absolutely no conflict between our mineral claim and forest purposes, that is, the protection of timber, the protection of any of the things that the Forest Service protects.

The Court: But that is a matter for argument. In other words, that is a matter of law.

Mr. Davidson: That is right. I just want to clear up this public service site recreation as alleged as a public service site.

Q. (By Mr. Davidson): These are the regulations as they now stand. They came out in the 11 Federal Register, and I presume you have followed

(Testimony of Chester M. Archbold.)

them since they were issued as far as recreation areas, public service——

The Court: You don't mean Federal Register, do you?

Mr. Davidson: Federal Register; yes.

The Court: I thought you had there a volume of the Code of Federal Regulations.

Mr. Davidson: It is the Code of Federal Regulations; yes; but it was originally issued—— [77]

The Court: But they are distinct publications, and to keep confusion from creeping into the record you better call it——

Q. (By Mr. Davidson): All I was saying is, this is the existing code and as revised by printing in the 11 Federal Register and that has governed the administration of that area since the publication of this regulation, has it not?

Mr. Baskin: Well, may it please the Court, I might state, and I will object for this reason, that the regulation that existed when that was set aside is not the same regulation as it is now under the Code of Federal Regulations. That is why I amended the complaint.

Mr. Davidson: I would quite agree with that. I think it was in 1944 this 11 Federal Register made the regulation as it is, and since which time I want to know whether they have been following that regulation as to recreation use for this ninety-one acres under this regulation.

The Court: Suppose you prove that they did or didn't, how would it contribute to the solution of the question here in this case?

(Testimony of Chester M. Archbold.)

Mr. Davidson: I think, well, for one thing it would show that this recreation—if it is anything, it is a recreation area and not a public service site, so that those two classifications are entirely distinct now.

The Court: And suppose you prove that, then what? [78]

Mr. Davidson: If it is a recreation area, I think that the manual of forest regulations will show that that classification was for the purpose of preventing mineral entry and not for the purpose of recreation.

The Court: Well, then, so what?

Mr. Davidson: So, your Honor, this, I believe, is a court of equity at least. At least I think if we come in with a claim as to recreation use and we prove that the Forest Service didn't intend it to be used for recreation at all but did it merely to prevent mineral entry, I think that their case falls on that ground at least.

The Court: Well, you can ask him what their intention was.

Q. (By Mr. Davidson): What was, your intention was, I think, as you have repeatedly said, this 1940 classification, to create a recreation area?

A. That is right. We planned that from about 1935 right on through as a recreation area.

Q. How is a recreation area defined now?

Mr. Baskin: Well, may it please the Court, I don't see—that would be a matter of law or regulation——

(Testimony of Chester M. Archbold.)

The Court: Well, I think it is immaterial how it is defined anyhow.

Mr. Baskin: ——and we object.

A. It is any place that anybody wants to carry on a recreation, [79] I imagine.

Q. Handing you these regulations, those are the regulations and part of the forest manual, are they not? A. They are; yes.

Q. Now, I want to ask you if this is the regulation U-3 B concerning recreations areas; is it not?

A. Well, I didn't look at it too closely there. You turned it over now. What I looked at was wilderness area on the front.

Q. I am sorry; yes.

Mr. Baskin: If he is referring to the present regulations, they are in the Code of Federal Regulations there, and there are two sections to, I think, the regulation he is referring to.

Mr. Davidson: The witness has now said it has been recreation use under either the former or the subsequent, and it is not a public service site, that is, as defined by the regulations.

A. I take exception to that. Any recreation area that we use is classified as a public service site to begin with.

Q. (By Mr. Davidson): Right now?

A. Certainly. Every one of our campgrounds is a public service site. The public uses it. We provide service for the public on these public service sites.

Mr. Davidson: This is not very material, [80]

your Honor. I just want to avoid confusion between the terms recreation and public service.

The Court: Well, but I am not interested in obviating confusion between the two unless it becomes material to do so.

Mr. Davidson: Well, it becomes material to do so, I think, only in the sense of this part of the Forest Service Manual.

Q. (By Mr. Davidson): Now, this section is the regulation U-3 B which is the classification for a recreation area, is it not?

A. I will look at it and see. U-3 B; yes, that is a part of the regulation.

Q. It says here "regulation"——

Mr. Baskin: Just a moment. May it please the Court, unless he shows the materiality of that regulation to some point he is trying to bring out, I am going to object to it. I don't see any relationship at all to what has been said as to what that regulation means.

Mr. Davidson: Let me add this then.

Q. (By Mr. Davidson): Doesn't it also refer to classification as public service sites such as for restaurants, filling stations, stores, horse and boat liveries, so it applies both to public service sites and to recreation areas, doesn't it? [81]

A. It does; yes.

Q. It goes on to say, "Regulation U-3 affords the maximum protection against mineral location which the Secretary of Agriculture can do——

(Testimony of Chester M. Archbold.)

Mr. Baskin: I object to anything further along that line, your Honor.

Mr. Davidson: I had not quite finished it.

The Court: Well, he may finish his question.

Mr. Baskin: Very well.

Q. (By Mr. Davidson): ——and classification thereunder is desirable for all recreation areas, developed or potential, which are not mineralized areas in national forest lands withdrawn from the public domain." Now, I take it that that is part of your operations when you act on that word from the Secretary of Agriculture, do you not?

A. Yes, I do.

Q. Were you acting—was this classification order of 1940 in any way based on that statement?

Mr. Baskin: Well, now, may it please the Court——

The Court: As I read that, that recommends, you might say, to the administrative officers that action of a certain kind be taken or they recommend or point out that action of a certain kind is a protection against the appropriation of land under the mineral laws.

Mr. Davidson: It is not quite that. [82]

The Court: All right. And now, so what?

Mr. Davidson: Well, it recommends this particular classification as the most desirable.

The Court: Well, but what is wrong about it if they follow it?

Mr. Davidson: Well, because among other things mineral lands are reserved from sale by Congress,

(Testimony of Chester M. Archbold.)
which means that they are open to entry by Congress and there are only two people in the United States that can stop that and one is the President and the other is the Secretary of the Interior. I think that it is neither right nor proper for such officers, or not such officers—they are only following the regulations that the Secretary of the Interior gives them, but that regulation, I think, manifestly goes beyond the power and authority——

The Court: That is all a matter of argument, but so far as examining the witness about it——

Mr. Davidson: I just wanted to find out if in any way he acted on that.

The Court: I am pointing out that, if he did, it wouldn't have any probative value here. It would just simply probably get you some additional force for your argument on that point; that is all; but you have that anyhow without questioning him on it.

Q. (By Mr. Davidson): One more question. This withdrawal, [83] that is the method which was ultimately adopted to withdraw this land from mineral entry, was it not? A. That is right.

Q. That is part of the same regulation?

A. That is the same.

Mr. Davidson: I offer this as Defendant's Exhibit 1.

Q. (By Mr. Davidson): One further point——

Mr. Baskin: Wait just a minute. May it please the Court, I am objecting to the introduction of that.

(Testimony of Chester M. Archbold.)

The Court: What is the purpose of the offer?

Mr. Davidson: Your Honor, you can't take judicial notice of that paragraph because it is not a regulation. I must have it in the record somewhere to make any argument, as you point out.

The Court: Well, that is part of the regulations of the Service itself or the Department?

Mr. Davidson: No. It is part of the Forest Service Manual which includes regulations and a number of other things.

Mr. Baskin: It is just a statement in the Forest Service Manual; that is all in the world it is, an opinion of some man in the department. He may be a lawyer; he may be just a civilian. It is an opinion for their guidance.

The Court: The only thing it would prove is that [84] they have a policy of, you might say, discouraging mineral entries, and that is, as I have intimated before, of no evidentiary value here on the questions involved.

Mr. Davidson: You can only argue law from the facts, your Honor, and one of the arguments here is of course that these acts are all in excess of authority of the Forest Service.

The Court: You may argue that without having that in evidence.

Mr. Davidson: Except, I think, your Honor, it is pertinent to our argument to show that the regulations themselves show that. The language itself is significant, and it also shows the dangers of allowing this sort of an administration.

(Testimony of Chester M. Archbold.)

The Court: Well, you want to get now into a political question, it seems to me.

Mr. Davidson: Well, I think that underlying all of our mining and forest law it is ultimately a question of——

The Court: You can argue the fact that this land was open to mineral location regardless of what local regulations there might be or what the manual says.

Mr. Davidson: I will say one more thing then.

Q. (By Mr. Davidson): This circular letter, are you familiar with that?

A. I have it in my file; yes. [85]

Mr. Davidson: I will merely offer this in evidence to show that the Forest Service has now abandoned the policy that they set out there.

Mr. Baskin: I object.

The Court: Objection is sustained to that. There is no use cluttering up the record with that. I think we will adjourn at this time.

(Whereupon Court adjourned until 10:00 o'clock a.m., January 26, 1952, reconvening as per adjournment, with all parties present as heretofore; whereupon the witness Chester M. Archold resumed the witness stand, and the Cross-Examination was continued as follows):

Mr. Stump: Just a few questions.

Mr. Baskin: Well, may it please the Court, I think there is a rule against two attorneys examining the witness, isn't there?

(Testimony of Chester M. Archbold.)

The Court: I think there is.

Q. (By Mr. Davidson): Yesterday, Mr. Archbold, we discussed that map there. That is a map that the Bureau of Public Roads sent to the Forestry Service. That was revised in November. Will you tell what those revisions were? That is the map as it exists now. It is not the one that the Bureau of Public Roads sent.

A. The original one; no, it is not.

Q. And there are several changes. I want to say right at [86] the outset that we admit that the exterior lines are the same.

A. The exterior lines of the thirty-seven and a half acres are the same, but the stream is slightly to the southeast of its location on the original map.

Q. And the original map had no designation of gravel road on it?

A. That I couldn't say. I would have to see the other map.

Q. I will have to get the other map. Can you produce that other map?

Mr. Baskin: Well, may it please the Court, does that make any difference whether or not the other map showed the road? It would be a fact of whether or not the road was there, which the witness can testify to.

Mr. Davidson: It is a small point. I don't like to leave a map with the road platted on it with the implication that that was what was prepared prior to this suit. I think there is no question that that gravel road——

(Testimony of Chester M. Archbold.)

The Court: Well, it seems to me that we are exploring too much into little irregularities that make no difference here, and of course they are time-consuming.

Mr. Davidson: Well, I don't want to be time-consuming, but, if it is the fact that either the Bureau of Public Roads or the Forest Service added that designation, gravel road, I believe sometime in November and certainly [87] after this suit was brought—and that is all I wanted him to say.

The Court: Well, but what would that tend to prove or disprove?

Mr. Davidson: It would tend to place no reliance on the map as being a designation of a particular area used.

The Court: Well, but it hasn't been introduced in evidence.

Mr. Davidson: Yes, it has, your Honor, as part of the admissions. We admitted that that map was correct as to its exterior lines, and I just want to show that its interior——

The Court: I didn't know that that was ever introduced.

Mr. Davidson: Well, it is part of the admissions. The plaintiff requested that we admit it, and we did.

The Court: Has that particular sketch been identified in the admission?

Mr. Davidson: Yes.

The Court: How?

Mr. Davidson: It is attached to the admission.

The Court: You mean there is a copy of it?

(Testimony of Chester M. Archbold.)

Mr. Davidson: That is right. There are duplicates of it.

Mr. Stump: It is material further, your Honor, on that point because they have claimed the road as a development [88] and that map is incorrect as to the road, and that is why it is pertinent at this time.

The Court: Well, it is not whether it may be inaccurate in some respects but whether or not the road existed.

Mr. Davidson: Yes, sir; other than the fact that it is on a map is, I should say, some evidence at least that it existed. Mr. Archbold pointed out to it yesterday as existing at that area. We used that map for that purpose.

The Court: Well, do you want to show now that it doesn't exist, or what?

Mr. Davidson: I want to show first that that survey—yes, I definitely want to show that it does not exist as shown on that survey and among other things that that survey was prepared long after that road was placed on that survey, long after this suit was brought.

The Court: That is just what I am getting at, is, so long as the road exists, what difference does it make that it doesn't exist exactly in the way it has been portrayed?

Mr. Davidson: It is a lot more than that, exactly as portrayed; it is very much.

The Court: Well, so let's say that it substantially differs. All right; then what is the effect of that; what is the legal effect of it?

(Testimony of Chester M. Archbold.)

Mr. Davidson: Well, the legal effect of that is there couldn't be any appropriation of the land despite the [89] fact that it is marked on a survey. Ordinarily one of the best evidences of what land is the area of land that has been used as a survey that purports to be a survey.

The Court: Well, but a roadway, as it exists on the land that is involved in a controversy of that kind, is a roadway with everything that it is entitled to so far as legal implication is concerned, regardless of the fact that it may not be accurately portrayed. Now, what I am getting at is it would make a lot of difference if the roadway wasn't there at all and they showed it as being in existence, but, if it is admitted, as it appears to be, that the road was there but that there was some inaccuracies in portraying it, what difference does it make?

Mr. Davidson: Very well. I will go on to the character of the road itself then.

Q. (By Mr. Davidson): How far did trucks travel and how far could they travel along any developed roadway area?

A. Trucks at times could go within three hundred feet of the discovery point.

Q. That is southwest of it?

A. Yes. That is up to the upper limits of what is shown as a road there. Up to within three hundred feet of the discovery point.

Q. Now, you say "at times." What do you mean by that?

A. At times, the upper end. We had no reason

(Testimony of Chester M. Archbold.)

to go much with [90] trucks beyond the gravel bunker, the loading ramp. And at times, when it was necessary for the dragline machines to move farther up, why, it was a very simple operation to make a road with a bulldozer that a truck could go on. All they would have to do is level off the ground. It was all hard gravel so it was no problem at all. You can go any place on that north side of the stream with a very small amount of work to make a good road even after the stream has had its high-water stages.

Q. In other words, a truck can drive virtually anywhere up there?

A. I didn't say that. I said that it could along that road that has been traveled. You couldn't get up in the timber. It would be impossible to go up in the timber.

Q. Well, I was just trying to determine what was done to let the trucks—what by way of establishing a road was done? You mean a bulldozer went first and then a truck followed?

A. The bulldozer went over it sufficiently to make a road, like any place. Bulldozing a road, that is a common term.

Q. Well, you just said it is all hard gravel up there and they could go anywhere along the north side of the stream.

A. That is right; along where the roadway was built. Sure, it has hardpan underneath that has never been disturbed even by high water. It seldom

(Testimony of Chester M. Archbold.)
cuts far into that north side because we didn't remove the gravel underneath that [91] road.

Q. I suppose what you mean is that there were stumps that had to be removed here and there and something of that sort? A. That is right.

Q. Now, do floods ever cover that land with debris again now?

A. It does at high-water stages, but not every point of the road.

Q. What I am getting at is that roadway was once cleared of debris for some purpose; since that time, and I suppose all during that time, high water covers it with the same sort of debris all over again?

A. Well, not to the same extent because they removed so much of it.

Q. Yes, but some difference perhaps in character. But it could be covered with a log situation; it could have been covered with a log at any time. The building of that was removing the logs or stumps?

A. Well, if you want to know whether you could travel up there with a car, I could say that in all the time we had possession of the pit you could drive a Pontiac sedan to the log loading ramp at any time up until the time that the barricade was put in. After the barricade was put in I couldn't do it.

Q. To that extent you could drive a car while you were in [92] possession of it. That log loading

(Testimony of Chester M. Archbold.)

ramp was about the middle of the twenty-acre claim?

A. No. Slightly above the middle of it.

Q. That road, the contractor finished using that road in December of 1950, did he not?

A. That is when he moved his dragline equipment out.

Q. That is right. Did the Forest Service do any maintenance of that road thereafter?

A. It was not necessary to. I had witnesses that I have driven up there a number of times. I have driven Mr. Wyller, Mr. Stoddart and others.

Q. I just want to ask you now, did the Forestry Service do any maintenance on it after December?

A. It was not necessary to.

Q. Well, you didn't do any? A. No.

Q. The Bureau of Public Roads didn't do any?

A. I couldn't say as to that.

Q. Well, you said a lot as to what they did before by way of taking gravel out.

A. I know that to be a fact, but as to their maintaining it I cannot answer that question.

Q. Now, in the wintertime—the spring freshets bring vast quantities of gravel down?

A. After every freshet. [93]

Q. And debris? A. Some debris.

Q. And washes out stumps from far up this area?

A. No. Not from far above; no. There is too much other debris to hold it back.

Q. Logs and all sorts of debris come down that stream, don't they?

(Testimony of Chester M. Archbold.)

A. Only that material that our contractors disturb in cutting and bucking into logs is all on our area.

Q. Well, what I want to ask now is, in the spring of 1951, were there any logs, boulders or other debris on that road at any point between the Tongass Highway and the log bunker?

A. As I say, up until the time the barricade was put in I could drive a sedan without any difficulty to the log ramp.

Q. When did you do that, before or after June 21st?

A. Before and after; until the barricade was put in.

Q. I am not concerned with after because I know why that was possible to do it then. I am concerned with before. I just want to find out when you drove up there between December 30th and June 21, 1951.

A. The mere fact that Mr. Schaub pulled a trailer in there at the time he barricaded it——

Q. That is quite true. [94]

A. ——he could get that in there and out without any trouble.

Q. That was after June 21, 1951?

A. That is right.

Q. I want to know the situation between December 30th and June 21, 1951. Did you ever drive on that road during that period? A. I did.

Q. All right. Do you know what date you drove on that road?

(Testimony of Chester M. Archbold.)

A. I can back it up with entries from a diary which I do not have right here now.

Q. Well, you don't remember whether you did or not? A. I do remember; certainly.

Q. You definitely drove a car?

A. A sedan.

Q. Up to the bunker? A. I did.

Q. I mean the ramp.

A. At least two or three times.

Q. And you don't remember whether that was in December—was it in the early part or after?

A. Oh, I would say it was sometime in May or June, or April, May or June, 1951, and possibly in July.

Q. I am not interested in anything after the date——

A. Well, I will tell you—I have a picture here of the sedan parked in front of the log ramp after the claim was staked. [95]

Q. After the claim was staked I know why you could get up there because Mr. Schaub cleared that way to get up there himself. But I want you to say when you drove that sedan up there.

Mr. Baskin: May it please the Court, I think he has answered that—"April, May or June, 1951." He answered that question.

The Court: It seems to me it has been gone over.

Mr. Davidson: I just want to make sure that he has no clear recollection as to the date. It is my feeling, your Honor, that these freshets periodically

(Testimony of Chester M. Archbold.)

wash out or cover that road and can at any time and frequently do, and it is quite possible that——

The Court: I think he has already shown his inability to remember any specific date.

Mr. Davidson: All right.

Q. (By Mr. Davidson): Now, let's get to this log loading ramp. What is that made out of?

A. It is made out of spruce logs.

Q. How many logs are there; do you know?

A. I can figure it out by looking at a picture probably.

Q. I may save time.

A. I have a copy of it. Oh, there is at least eight or ten. There is some concealed by the ramp.

Q. That ramp was built in 1949, was it not? [96]

A. It was built by Mr. Almquist during his contract which was approved—it is immaterial whether I can remember these dates.

Q. I just want to get some idea. I don't care about the date.

A. On October 25, 1949. I believe that he did build it in one of his first operations.

Q. And you testified yesterday that he left it there because you asked him to leave it there for your use? A. Yes.

Q. Does the Forestry Service have a bulldozer?

A. We certainly have.

Q. When did you get that bulldozer?

A. We have had bulldozers——

The Court: I think it is immaterial when they got it.

(Testimony of Chester M. Archbold.)

A. We have had bulldozers since 1933 that I know of.

Q. What maintenance did the Forestry Service do on that log loading ramp?

A. We did none.

Q. You didn't maintain it at all?

A. Not ourselves; no.

Q. Did anyone ever use that log ramp after Mr. Almquist left? A. That I cannot say.

Q. You don't know of any other use of it [97] ever? A. No, I don't.

Q. I want to ask now about this Correction Memorandum No. 11. Is that the type of memorandum that the Forest Service issues on homesteads?

A. No.

Q. When you relinquished it from the national forest? A. No, it isn't.

Q. What are the other Correction Memorandums? This is No. 11.

Mr. Baskin: Well, your Honor, I object to that. That is going into matters that are irrelevant and immaterial. The only thing that is in issue here is that thirty-seven acreas of land described in Correction Memorandum No. 11, and any other memorandums that they issued has nothing to do with this case.

Mr. Davidson: I am trying to eliminate the ninety-one-acre point from controversy, your Honor, because, if this is a relinquishment or a change from Forest Service control, it seems to me that it can no longer be classified as ninety-one acres. That dates

(Testimony of Chester M. Archbold.)

as of February 9 the ninety-one acres and for that reason as well as many others would be immaterial to this case.

The Court: You may ask him about that.

A. To answer that, we have a lands plan for the development of the land resources of the Tongass Highway. That plan is the original. [98]

Q. (By Mr. Davidson): I think you have answered my question when you said that it is not the same as the elimination for a homestead. How do you go about eliminating land from the national forest for a homestead?

Mr. Baskin: Well, may it please the Court, I object to that. That is getting into matters that are not in issue.

The Court: I don't see the materiality of that.

Mr. Davidson: Very well.

Q. (By Mr. Davidson): Who now controls the land, that thirty-seven acres? Is it under the jurisdiction and control of the Department of Commerce?

A. No. It is still national forest land.

Q. Then, I just want to be absolutely certain about this one thing. Is that land now classified both as a recreation area—I am speaking now of the thirty-seven acres——

A. We have not changed the designation of the ninety-one and thirteen hundredths acres. We consider that as the original public service site.

Q. I grant that you haven't changed it on your records yet, but do you regard it with this issuance

(Testimony of Chester M. Archbold.)
of this Correction Memorandum as now a part of a recreation area?

A. I consider it as a part of the recreation area.

Q. And it has been despite that February 9th memorandum?

A. It is still—when we make plans for such a recreation area to start with, we have a vision of possibly improving [99] it by building roads, taking out gravel, building a swimming pool and picnic areas. As I have already testified, every Sunday the people use it as a recreation area. We encourage them to do it.

Q. I am sure you encourage people to go into the national forest. I am just wondering how an area which you testified, or counsel in his opening statement testified, will shortly be torn up and over one hundred thousand cubic yards of gravel has to come out of there, counsel said—now, I just cannot see how a swimming pool or picnic tables or trails or any other single thing you mentioned can be economically useful or properly operated through an area out of which one hundred thousand cubic yards of gravel is coming. It puzzles me, and I want to know.

Mr. Baskin: I think that is argument he could make to the Court.

The Court: Isn't that a good deal like, if this were an ordinary mining case, controversy over a claim, you would ask a party why he resorted to one method of mining rather than another?

Mr. Davidson: Well, no, your Honor. I think

(Testimony of Chester M. Archbold.)

there is a conflict between use by the public and use to extract——

The Court: But it isn't enough, as I have said time and time again, to point out an inconsistency or conflict unless it has some bearing on the issues here, and I don't see [100] how it has any bearing.

Mr. Davidson: The bearing on the issue is, if there is a conflict, it seems to me the conflict eliminates from the case this recreation area designation.

The Court: Well, that is something you may argue.

Mr. Davidson: That is all. Your Honor, before redirect examination I would like at this time to make a motion to strike out paragraph four of the complaint for the reason it is irrelevant to this case and I could give some brief reasons but I would like to give the specific reason that compels me to do it this time.

The Court: Well, now——

Mr. Baskin: Of course, the motion is untimely, may it please the Court.

The Court: This paragraph four, it seems to me, has been admitted.

Mr. Davidson: It has been admitted. There was a designation of that area, but there has not been an appropriation of the land. I could argue, I suppose, that allegation is a conclusion of law. We admitted the facts stated. The particular point I want to point out to your Honor is, if that allegation is material and relevant, I believe——

(Testimony of Chester M. Archbold.)

The Court: You better designate or specify the allegation.

Mr. Davidson: Paragraph IV. "The 37.5 acres of [101] land described in paragraph III were and now are a part of 91.13 acres of land, more or less, set apart and appropriated——

The Court: I don't see that in Paragraph IV. It is not in what had been added. Go ahead.

Mr. Davidson: It raises this particular problem and did yesterday, in that, if that is relevant, that appropriation, as a legal appropriation of land to the Forestry Service use, I think that the policy of the Forest Service is very relevant to this case in that a proper legal argument can always be effect of a decision. That argument is the basis of why I want to put in the Forest Service policy, and it is not for the purpose of questioning anyone's good faith, rather it is for the purpose of showing their good faith. I honestly believe that this regulation was made in good faith under the policy that the Forestry Service has.

The Court: Well, I am having difficulty in following you. Now, you started out talking about an allegation and then you drifted onto policy.

Mr. Davidson: Your Honor, you excluded yesterday these regulations as to the policy of the Forestry Service in designating, appropriating, public service sites, recreation areas. Now, there is no way for me to establish the legal argument that I wish to make on the policy of the Forestry Service as constituting a complete reversal of the [102]

(Testimony of Chester M. Archbold.)
mining laws unless I have evidence of that policy in the record. Now, the only evidence of that policy that I can have, other than my own belief, is what the Forestry Service says its policy is. It is not a question of good faith of anyone but as to the policy which I think is going to be put to that issue.

The Court: Well, as I understand it, you contend that the policy, as referred to here yesterday, has been incompatible with the spirit at least of the mining laws.

Mr. Davidson: Not only the spirit but the letter, the letter and the spirit of the mining laws.

The Court: Well, then after you have shown that, so what?

Mr. Davidson: Well, that is a legal argument, your Honor.

The Court: Well, but what value is the legal argument? I just don't see where it would have value in this case.

Mr. Davidson: Well, if it has no value in this case—I have to have something on which to base my legal argument on, your Honor. If I haven't got any basis for it, I have lost my legal argument.

The Court: Well, but what I am calling attention to is I am questioning what use you could make of it even though you could establish it. [103]

Mr. Davidson: I can use it as the basis for the legal argument that the result of a decision on this point which would be unprecedented, your Honor, and would have far reaching and very unwarranted results against the spirit and letter of the mining

(Testimony of Chester M. Archbold.)

laws; now, that, I believe, is the persuasive argument if not a conclusive one.

The Court: Well, I can see where you can criticize and censure, if you wish, the Forest Service for having a policy of the kind but, so far as showing me how it could possibly be involved in any question before the Court, I can't see it.

Mr. Davidson: Well, if the Court was going to decide on this issue, I think the Court should be aware of that policy of the Forestry Service.

The Court: If I am aware of it, then how does it affect the determination of the question?

Mr. Davidson: You are aware of it as I have spoken it, but it is not argumentative, that policy. It is set out in those regulations, and that is the sole purpose I wish it in for. If this paragraph of the complaint is relevant to the case, I believe that argument is relevant to the case, and the only evidence that I can bring forth to support that argument is in those regulations.

The Court: Well, but you don't get my point. My point is, suppose you prove everything you want to prove, and [104] that would amount to, as I get it, that they have a policy that is incompatible with the spirit of the mining law.

Mr. Davidson: That is right.

The Court: Then my point is, my question is, suppose you have proved that, then what have you proved so far as the solution of any of the questions presented here?

(Testimony of Chester M. Archbold.)

Mr. Davidson: A decision which would result in an absurd result should not be made.

The Court: I don't know what kind of a decision you are referring to. A decision of what?

Mr. Davidson: A decision of this Court that a designation of an area appropriates the land to Government use or that it bars a mining claim, whatever you wish. A decision of that point, I believe I can demonstrate through the use of this Forest Service policy, would result in mining laws of all national parks being suspended by the judgment of the regional forestry. Now, that, I believe, is an absurd result, and I think the Court should have the benefit of that argument, and the basis of that argument is not that I say so but that the Forestry Service says so.

The Court: Well, but it seems to me that whether or not there has been such an appropriation or reservation of the land here, as would preclude a mineral entry, does not depend on the Forest Service policy. It depends on what they did that would preclude location under the mining laws. [105]

Mr. Davidson: I will grant, your Honor, that is right, but, if that is right, then I believe this paragraph is irrelevant, and that is why I move to strike it.

The Court: Well, the motion is denied at this time.

(Testimony of Chester M. Archbold.)

Redirect Examination

By Mr. Baskin:

Q. Now, Mr. Archbold, yesterday you testified—I believe counsel read to you or had you read a paragraph in Mr. Berg's contract. Now, state whether or not that contract also provided that the borrow material would be removed from Whipple Creek gravel pit?

A. That is right; the contract does.

Q. And did it provide that the gravel will be removed from an area that is now claimed by the defendant? A. That is right; it does.

Q. When you examined the boundaries of the defendant's claim, will you tell the Court now just the terrain and the nature of the timber that existed around his boundary there?

A. At the lower part of the claim there is big spruce.

Q. Well, I mean generally. Is it heavy timbered land?

A. It runs from heavy to sparse over on the right-hand side where it passes through some scrubby muskeg. The rest of it was originally heavy hemlock spruce. There are some [106] trees there that will range as high as five feet on the stump, a few of them.

Q. And are there a lot of windfalls all through the area along the line where his stakes are?

A. Along the north side there are windfalls at the upper end of his line, and the lower end of it is in heavy timber.

(Testimony of Chester M. Archbold.)

Q. Isn't there a lot of underbrush all over the area?

Mr. Stump: Just a moment please. I am going to object to the form of these questions. Mr. Baskin, every question is leading that you have asked here so far.

The Court: Well, of course, the objection to leading questions does not obtain so much where there is no jury and where the witness is an intelligent witness. This witness is not the kind that is going to be led into saying something that isn't a fact merely because the form of the question is leading. While you may or perhaps should refrain from asking leading questions, if it is a question that cannot be framed except in a rather roundabout, indirect way and one that takes a lot of time, why, you may ask it in a more or less leading form.

Mr. Baskin: I was just trying to save a little time, may it please the Court.

Q. (By Mr. Baskin): Describe the terrain around the boundaries of the defendant's claim.

A. As you take from Corner 4 to Corner 5, that is the northwest [107] boundary, it is off to the left of the stream bed, and it commenced to get into little rolling humps along there. The south boundary, Corner 3, is the highest point on the claim probably. That may be questionable at that. But it is up on the side hill, higher than the rest of the valley. It must be thirty feet in elevation above the stream bed.

Q. Well, has that area, which is covered by his

(Testimony of Chester M. Archbold.)

claim, been cut by the stream in various places as it meandered through the years?

A. Through the years the main portion of the stream cut to the north. There is evidence of a side stream cutting off, well, almost, well, as far as the claim line on the north side there.

Q. Now, when the Forest Service set this land aside on the 9th of February, 1951, for the use of the Bureau of Public Roads, was that for their exclusive use, or was that for both the Bureau of Public Roads use and the Forest Service use?

A. For the use of both agencies; yes.

Q. You mentioned a while ago that trucks could go up within three hundred feet of the defendant's discovery post. Now, has equipment been used in removing that gravel any closer to the discovery post than the three hundred feet that you just mentioned? [108]

A. A bulldozer came within fifty feet of the discovery point and cut a corner of the stream bed, made a right-angle turn, and it cut it crosswise to change the course of the stream to develop the bank. Along the south side of the stream at several places the bank is sheer from the upper bank to the floor of the gravel on the stream bed, as much as fifteen to eighteen feet high. That was developed by the contractors swinging the stream back and forth to help develop it, wash the gravel, the fine sand, the clay and the overburden out so we would have washed sand and gravel for our road.

Q. And in loading that log ramp did the con-

(Testimony of Chester M. Archbold.)
tractors or the operators of the machine, did they operate between the log ramp and the defendant's claim?

A. You mean, and the upper boundary of his claim?

Q. Yes. I mean and his discovery post, I meant.

A. That is right. He would take his bulldozer back there and start shoving down the elevation—he wanted gravity—a little ways so he would shove it down and up onto the ramp and load his trucks that way.

Mr. Baskin: No further examination. You may be excused.

Mr. Davidson: Just one moment. [109]

Recross-Examination

By Mr. Davidson:

Q. You said this stream has meandered over the years for its various courses? A. That is right.

Q. That has exposed a great deal of gravel over this whole claim?

A. I don't believe that it exposed a great amount of gravel there except now that it has cut down so deep. There are, as I say, old stream beds to the north that swing off. You can see the route of the stream, and off to the right there is one short cut across there that has gravel showing in it below the discovery point.

Q. Now, I just wanted to again clarify the area of heavy timber on the boundary line of the claim. Where was that heavy timber?

(Testimony of Chester M. Archbold.)

A. The heavy timber is down at the lower end of the claim on both sides of the creek.

Q. That is one of the north and south lines? I just want to clarify which line that is. You said two of them were clear. Is this one of the ones that is clear, the one that went through the heavy timber? A. I don't get the question.

Q. You said you had no difficulty tracing two lines. Now, I want to know if this line which runs through the heavy [110] timber is one of the lines once you had difficulty tracing?

A. That is right. I did not——

Q. That is all I want to know about it. Now, this bulldozer came within fifty feet of the discovery post. What date was that, that bulldozer went up there?

A. If he built his log ramp shortly after this contract——

Q. Almquist's contract?

A. Almquist's contract.

Q. And in 1949?

A. '49 and the spring of '50.

Q. Do you know how long the bulldozer was up there? Did it just go up there and turn around, or did it go up there and work up there?

A. It went up there and worked up there.

Q. For a day, a week, a month?

A. He had his "cat" there for probably over a period of two or three months.

Q. This is solely addressing myself to the time the bulldozer, you said, went within fifty feet of the

(Testimony of Chester M. Archbold.)

discovery post. I just rather gathered from your testimony that it went to that point, bladed across the river and came back.

A. Oh, no. He shoved gravel from there. There would be no sense in having it unless he could push and load gravel.

Q. Well, you said he did that to divert the stream. That [111] was the confusion. If you are now saying that he had a bulldozer up there within fifty feet of the discovery post working in the stream bed regularly day by day in 1949, that is all right. I got the impression from your testimony that he sent a bulldozer up there to partially dam the stream and divert it and then he went back down and worked where he had the work.

A. No. He had it there in diverting the stream; he also loaded gravel into the trucks.

Q. Well, he loaded gravel into the trucks at the ramp? A. Yes.

Q. And that is not within fifty feet of the discovery post?

A. No; but he shoved the gravel down. They push as high as five, six, seven hundred feet bulldozing.

Q. I just want to get it clear as to what the use was within fifty feet of that discovery post. You say now that the bulldozer went up there through this entire operation?

A. Whenever it was necessary. He had a road to build and he would move his equipment on.

Q. He had a lot of other equipment a lot closer

(Testimony of Chester M. Archbold.)

to the Tongass Highway than fifty feet from our discovery post, did he not? I mean—I just want to know—I am trying to determine the area of use and the character of the use in the particular area. I don't want to press the point unnecessarily. I just want it stated; that is all. [112]

A. Well, he started in. He had a clamshell and dragline.

Q. To simplify it I would like to restrict it solely to the area fifty feet from the discovery post; that might make it simpler.

A. Well, then, Mr. Berg moved the dragline in within one hundred feet of that, if you want to know.

Q. I just want to find out the kind, the character and the time of use within fifty feet of the discovery post, just solely that point now.

A. A bulldozer——

Q. Well——

Mr. Davidson: I won't ask any further questions about that. That is all.

Mr. Baskin: You may be excused.

(Witness excused.)

CHRISTIAN F. WYLLER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name?

A. Christian F. Wyller.

(Testimony of Christian F. Wyller.)

Q. And what is your position, Mr. Wyller?

A. I am District Engineer of the Bureau of Public Roads.

Q. Of what region? Where is that; in [113] Alaska?

A. My district is under Division 10, Alaska, Bureau of Public Roads.

Q. And how long have you held that position?

A. Since 1948.

Q. Are you asquainted, Mr. Wyller, with the gravel pit at Whipple Creek near Ketchikan, Alaska? A. Yes, I am.

Q. Are you acquainted with the fact that gravel has been removed from that creek for the purpose of building roads in Southeast Alaska?

A. I am.

Q. When did the Bureau of Public Roads first use that gravel pit for construction of roads?

A. In general construction of the highway in 1934.

Q. And just tell the Court briefly what was done there in connection with that highway.

A. The gravel was taken from the creek to construct the approaches to the Whipple Creek Bridge.

Q. Where was that gravel removed from?

A. From the creek bed.

Q. And are you familiar with the location of the defendant's claim as it overlaps the thirty-seven acres of land that has been set aside for the Bureau of Public Roads use? A. Yes, I am.

(Testimony of Christian F. Wyller.)

Q. Was any of that gravel removed from any part of his claim? [114]

A. I wouldn't be able to say. I wasn't there at the time it was removed. It may have been removed from just inside the claim limits.

Mr. Stump: I will move to strike that answer as not responsive.

Mr. Baskin: Well, that is for my motion, not for the defendant's.

The Court: That objection is available only to the person conducting the examination.

Q. (By Mr. Baskin): Now, Mr. Wyller, is the Bureau of Public Roads presently engaged in constructing a highway, on the North Tongass Highway? A. I didn't get the first of that.

Q. Is the Bureau of Public Roads presently constructing or supervising the construction of the North Tongass Highway?

A. Yes. We have a large project under construction now.

Q. When did that project begin; that is, when did you begin planning that project?

A. We made a survey for it in 1949.

Q. And then have you, since 1949 then, designed and planned that road?

A. The development of the project was consecutive. The survey began in '49, and shortly after that in the winter of '49 and '50 the design of the project was made and——

Q. Now, then, in connection tell the Court—

(Testimony of Christian F. Wyller.)

strike that. [115] Tell the Court how many miles of road that is now being built.

A. The project is about six and a half miles, I believe.

Q. And does that include both the construction of the road and surfacing and paving the road?

A. It includes construction of the road and surfacing with crushed gravel and crushed gravel material for the future pavement.

Q. Now, tell the Court whether or not the plans for the construction of that road include the removal of sand and gravel from the Whipple Creek gravel pit.

Mr. Stump: I will object to that, may it please the Court.

The Court: It is a plan that hasn't been yet put into execution?

Mr. Baskin: Yes, it is in execution or would have been except for the fact that the defendant barricaded the road and prevented the Bureau of Public Roads from using it.

The Court: Your contention is that it is admissible on the injunction aspect of the case?

Mr. Baskin: Yes; that as well as—my point is, is that and to show, may it please the Court, that as far back as 1950 it was planned for this project to include removal of gravel from the present gravel pit.

Mr. Stump: May it please the Court, on that point the whole thing would be immaterial unless they had a contract [116] that stated it had to be removed from the area.

(Testimony of Christian F. Wyller.)

The Court: Well, I think the plan would be admissible not only on the injunction aspect of the case but also on the issue of good faith, so the objection is overruled.

Q. (By Mr. Baskin): Tell the Court whether or not in planning that road the Bureau of Public Roads planned that the gravel be removed from the Whipple Creek gravel pit.

A. It was planned that the gravel for this project was to be obtained in the gravel pit at Whipple Creek; that was all along from the inception of the project.

Q. Now, did you do anything particular about making that gravel pit available for use in the construction of that road?

A. We had a survey made of the pit.

Q. When did you do that?

A. In May, 1950.

Q. Was that about May 5th to the 16th, something like that? A. That is right.

Q. And now, tell the Court just what that survey consisted of and what was done about it.

A. The survey was to investigate the amount of gravel we could expect to find in the pit, and for that purpose there were a number of test pits dug and a survey was made of the relative location of these test pits to the creek, to the area that had been worked before, and to the highway. [117]

Q. Now, did you estimate the approximate amount of gravel that is on that thirty-seven acres?

A. Yes. We have estimated it on a very ap-

(Testimony of Christian F. Wyller.)
proximate basis because we cannot, without opening the whole pit, tell exactly what is in there, but we have an estimate of what we believe is in the thirty-seven and a half acres.

Q. About how much is that?

A. This is my own personal estimate.

Mr. Stump: May it please the Court, I object.

Q. (By Mr. Baskin): Is it based upon your——

The Court: What is your objection?

Mr. Stump: I object since he says—there is no proof that he surveyed this and did this, and he started to answer that he is not sure. I would like to know the basis of any estimate he is going to give here.

The Court: Well, as I take it, the witness answered the basis of his estimate is observation. I don't know. You may go into that. He may state any estimate that he based on observation, but of course he can't just state a mere guess without ever even seeing the place.

Mr. Baskin: Well, may it please the Court, I can prove it by another witness. I was actually intending to eliminate another witness, but, if they want to go into that, I will be glad to do it.

The Court: I haven't shut you off from the examination [118] except so far as it would elicit a pure guess; that is all.

Q. (By Mr. Baskin): Well, have you examined the test pits and have you been over the area there that is set aside for the use of the Government?

A. Yes, I have, and the survey and the testing

was done not by me but under my direct orders and instructions, and I examined it after it had been done, and the estimate I have is based on the results of the survey.

Q. How much gravel do you estimate is within that thirty-seven acres for the use of the Bureau of Public Roads?

A. My estimate is about three hundred thousand cubic yards.

Q. Now, has the Bureau of Public Roads let a contract for the construction of that highway?

A. Yes.

Q. When did you do that?

A. The bids was advertised on July 20th, and the bids were opened on August 9th, and the contract was awarded on August 14th, and the final signature and execution of contract was August 28th of 1951.

Q. Tell the Court whether or not that contract provides that the contractor may obtain gravel from the gravel pit at Whipple Creek.

A. The contract provides that a portion of the material, about half of all the gravel that is to be obtained, shall [119] be obtained from the gravel pit area, from the Whipple Creek area, and the other part he may obtain it free of royalty from Whipple Creek.

Q. And that part of the contract that provided he shall obtain the gravel there, is that free of royalty? A. Yes.

Q. And it is free of royalty in both instances?

(Testimony of Christian F. Wyller.)

A. That is right.

Q. Incidentally, who is the contractor in that case? A. Manson-Osberg Company.

Q. Now, does the Bureau of Public Roads have any other plans for the use of that gravel pit?

A. Yes. We are to construct three miles of forest development roads for the Forest Service, which the money has been appropriated, and we estimate it will take fifteen thousand cubic yards of gravel from Whipple Creek to build those three miles, and then we have a survey of the road from Whipple Creek out to the end of the present system for reconstruction. While we don't have the money right at the present time, when reconstruction commences there—it will be within a reasonable number of years—the gravel must be obtained from Whipple Creek as the only source.

Q. And how much gravel is the contractor expected to remove from the gravel pit in construction of the present highway? [120]

A. One hundred and fifteen thousand yards, I believe.

Q. How much gravel do you expect to use on this project, this contemplated road-building program that money has already been appropriated for?

A. You mean the three miles for the Forest Service?

Q. Yes.

A. About fifteen thousand yards.

Q. And about how much will be——

Mr. Stump: Just a moment please. I did not

(Testimony of Christian F. Wyller.)
understand that last question, what the reference was to, where you were using fifteen thousand yards.

A. That is for three miles of forest development roads that we have to build for the Forest Service and for which we have the money now.

Q. (By Mr. Baskin): And then on the other I believe you said four miles that you have got surveyed? A. Close to five miles.

Q. About how much gravel will you need for that purpose?

A. We estimate about seventy-five thousand cubic yards.

Q. And will that gravel be removed from the claim that the defendant has staked off on that gravel pit?

A. Yes, it will be, the claim as it overlaps, the thirty-seven and a half acres. We take right out of that thirty-seven and a half and take the whole works, and there isn't [121] going to be that much in other parts.

Q. Mr. Wyller, is there any—strike that please.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Did I understand, Mr. Wyller, it is mandatory under your present contract that some of the material going in on your Manson-Osberg project bid be taken—would you show me that?

A. "Shall be obtained" from Whipple Creek is the only place.

(Testimony of Christian F. Wyller.)

Q. Are the plans in here? A. No.

Q. Mr. Wyller, with regard to the survey, you made a survey of that area in 1949?

A. I had it made. I directed it made.

Q. And how many other surveys have you got of road projects that you are going to do in the future that were made in 1949? Did you do any other surveys in 1949 for future road projects?

A. No, I don't believe I did.

Q. Did you do any in 1950 for future road projects? A. No——

Mr. Baskin: May it please the Court——

A. ——I don't just remember. [122]

Mr. Baskin: ——I examined him as to whether or not they have it; they have those plans. Now, I don't see that it makes any difference when they did it, whether it was '49, '50 or yesterday or any time, so long as it is before this claim was filed.

Mr. Stump: The point I am making, your Honor, is I think Mr. Wyller will admit that they have got surveys they made twenty years ago, that the making of a survey does not necessarily follow that they plan to immediately construct a road.

The Court: You may ask him that.

Q. (By Mr. Stump): You have a survey, too, have you not, from the end of Wards Lake over to White River?

A. No. It was started but it never got beyond the second lake.

Q. Well, you quite often make surveys for future road projects, which naturally you have to do in

(Testimony of Christian F. Wyller.)

advance, sometimes many years; isn't that correct?

A. That is right.

Q. In other words, the making of a survey itself does not necessarily mean you are going to build that road right away, does it?

A. No. But I didn't say we were going to build it right away, either.

Q. No; I know you didn't, Mr. Wyller; but I didn't want the [123] Court to have that impression. Now, you did the survey in '49 on it; when did you request money for that project?

A. Which project do you have in mind?

Q. The Manson-Osberg.

A. That part in the Bureau of Public Roads is not mine.

Q. It is not your department?

A. No. I don't ask for the money. I can tell you the money, the program and request for money, was started in '48-'49.

Q. In advance of the survey?

A. It was the seven-million-dollar special fund that survey was intended for.

Q. Well, that started in '48. You didn't know that you would necessarilly use it for this particular job, did you?

A. Yes, we did. It was on that program for which that money was obtained.

Q. All right. Now, during the time, 1950 and 1951, you publicized the fact, that you were going to build this road, as a matter of common knowledge? A. Yes.

(Testimony of Christian F. Wyller.)

Q. And when did you secure the money for it? When did you make a complete statement that you were going ahead, your department, that you were going ahead to build the road?

Mr. Baskin: May it please the Court, I have the statute here, the public law, that authorized the money, if he wants it, that is a public record, to show the date that [124] it was appropriated, and that was June 2, 1951.

Mr. Stump: June 2, 1951. That was a general appropriation, your Honor, and, while in committee they did list these projects, the appropriation was not made mandatory to any specific project.

The Court: What is your question now?

Mr. Stump: Well, I will withdraw it and make this.

Q. (By Mr. Stump): When did the—I will withdraw that. The policy of the Bureau of Public Roads, the first time the public knows definitely that you are going ahead definitely with a road is when you make an invitation for bids, isn't it?

A. No, not necessarily. On this particular project you are talking about we had some hundred pieces of right of way to obtain, some of them at quite a bit of expense, and at the same moment you begin getting the right of way you are advertising that you are going to make that project for all practical purposes because everyone keeps their prices up then.

Q. You would have to do that the same as a survey? That is a preliminary step, isn't it?

(Testimony of Christian F. Wyller.)

A. Yes; but it is only done when we know we are going ahead with the project.

Q. Well, you mean to say, when you have to buy right of way on the thing, that then you have to put it out on bid; [125] that isn't what you mean, is it?

A. I mean we don't go ahead and get that right of way before we know that we are going to get the money to do it. It is a certainty then that we are going to build it.

Q. But that certainty is not complete until you make the invitations for bids; that is correct, isn't it?

A. The certainty, it is absolutely certain the day the money is appropriated and set aside for it.

Q. What about those cases where you can't get a contractor to bid them in within the appropriation? Haven't you had to reject bids for construction because you didn't have enough money that any contractor would build it?

A. That is right; but we advertise them and we always build them sooner or later for the same money.

Q. For the same money? You have had to get increased appropriation to complete a project because no contractor would bid it?

A. We even had to wait a year to get some more money for it.

Q. That is right. Then the appropriation itself isn't a fact that the road is going to be built, is it?

A. Well, practically so.

Q. Well, as a matter of fact, there is nothing

(Testimony of Christian F. Wyller.)

definite on it until the contract itself is executed; isn't that correct? A. Well, I don't know. [126]

Q. Up until that time, even to the time they respond to bids, you can reject all bids under your invitation, can't you?

A. I can't; but I suppose my superiors could.

Q. Well, you know that your invitations read that way? What I am getting at on this is that until, as a normal practice, the bids are let, the public has no assurance of when any project you are planning is coming into effect, has it?

A. No. I expect you could put it that way.

Q. And then after the bids are let there is no assurance unless contractors can come within the funds appropriated; isn't that correct?

A. That is correct in a certain leeway in that the funds appropriated is in a lump fund for certain projects in this case and can be varied for their own specific project. In other words, probably the original was set up for a million and a half and it came to two million dollars on the estimate and it was distributed to take care of the increase.

Q. Could it likewise follow with a lump sum appropriation for three projects, let's say, of, let's say, seven million dollars, and, if your estimate was that it would do one, two and three, and it would only do one and two, then you could do one and two under the appropriation and leave three until a future date? [127] A. That is right.

Q. Now, at the time you had many requests and

(Testimony of Christian F. Wyller.)

queries as to when the road was going to be built in the Ketchikan area; is that correct?

A. Yes.

Q. And did your office ever issue any statement to the press? A. Yes, we did.

Q. To the effect that it would be built for sure?

A. We did.

Q. And when and where was that?

A. That was in the latter part of March in 1951 when we had a public meeting in Ketchikan on the condition of the roads at that time and as to what we were going to do, and right after that meeting there was a statement given to the press as to what we were planning on doing down there.

Q. But you didn't tell them at that time of the meeting or the press, guarantee them, that any road was going to be built definitely, did you?

A. Well, as definite as it could possibly be made.

Q. But you didn't have the appropriation then?

A. But we knew it was coming through.

Q. And you told the people at that time definitely?

A. We told the people at that time that we expected the appropriation to come through at any time. It had been [128] under consideration in Congress for some time then, and both projects in the Ketchikan area would have the first priority on the money we got.

Q. That meeting was out at Mountain Point with the residents out there, was it?

(Testimony of Christian F. Wyller.)

A. No. It was in the Bureau of Public Roads office in the Federal Building in town.

Q. With the Mountain Point residents primarily?

A. Oh, no. The first probably to be convinced that we were going to do anything was the fellow from the north end.

Q. Well, that is probably so. I recollect it. Did you ever state that you were going to use the Whipple Creek area?

Mr. Baskin: Well, may it please the Court, I don't see that that is material here.

Mr. Stump: I will withdraw it. That is right.

Q. (By Mr. Stump): Now, at the time, Mr. Wyller, that your office prepared the contract, the bids and so forth for that project, is that correct, for the Osberg-Manson Company, you prepared the specification, did you not, your office?

A. No. That is done in the division office. I am in the district office. I have the district office in my charge. I am familiar with all the steps in getting a project up to bids and I am consulted on various phases of the design and specifications and so [129] on.

Q. Well, you know that your office knew at the time that the contract was prepared and let that Mr. Schaub had filed a mining location on the Whipple Creek gravel area; isn't that correct?

A. Yes; that is right.

Q. This reference in the contract where you say

(Testimony of Christian F. Wyller.)

part of it was mandatory to be taken from Whipple Creek, what type of material was that?

A. That is gravel for borrow, borrow material, select gravel.

Q. And how much of that was to be taken from there according to the plans?

A. I will have to look at the schedule there.

Mr. Baskin: May it please the Court, I don't see that it is material to show—well, I guess maybe it is. Go ahead.

Q. What I would like is the amount and the type of borrow, the type of material.

Mr. Baskin: Wouldn't it suffice, may it please the Court, if he just stated the amount? The details of that type, is that material to the matter?

Mr. Stump: I think it is material as to why they would make it mandatory.

Mr. Baskin: So long as it is mandatory, that is the only issue there. It doesn't make any difference what kind it is. It is all sand and gravel. [130]

The Court: Well, the quantity and the requirement that it be taken from there would seem to be material.

A. Thirty-six thousand yards of material for borrow case one was mandatory to be obtained from Whipple Creek. The case two borrow, forty thousand yards, he could obtain, if he so choose, from Whipple Creek and also material for crushed gravel, stone bases and so on.

Q. (By Mr. Stump): Well, now, what type of

(Testimony of Christian F. Wyller.)
material is that? Is that screened and crushed aggregate on this case one?

A. No. It is fairly open-graded gravel that would drain, and it can't be too large, but there is no specific provision on it as to the size, and we don't specify a pit for that use unless we have tested it before and know that it is useable for this particular purpose.

Q. Is it the base coarse that goes in on your roadbed when you get to your graveling part?

A. The material comes up to the level where we continue with crushed gravel, from there on up.

Q. A good portion—they use beach gravel for that in many instances, too, don't they?

A. We use the—whatever material is the best material we can get for a reasonable expense on the particular job.

Q. Do you know why they made it mandatory that they take it from that area?

A. That is the only source within a reasonable haul of [131] that project. That material that is mandatory to be taken from Whipple Creek is material to go on the project from Whipple Creek back to the vicinity of Wards Cove.

Q. Well, what difference would it make to the Bureau of Public Roads if they just specify the quality, which is normal, isn't it?

A. No. When a pit has been proven and has been tested and we decide that is material which we have to have or want on that job, we make the bid for the case one borrow on the basis of the haul

(Testimony of Christian F. Wyller.)

from that pit and, if the price that he quotes or he states in his bid is for just excavation and the placing of the material on the grade, but the haul is paid for, and we have to have a specific bid in order to pay for that haul, otherwise we wouldn't know what the haul would be.

Q. Well, you don't mean to say that Whipple Creek would be the only area you could produce quality that you wanted, do you?

A. Yes, absolutely, within any reasonable haul.

Q. I mean, is that the only area where you could get the quality of the material you wanted?

A. That is, for that project; yes.

Q. Well, then, what about the quality on the rest of it? Where are they going to get that?

A. Well, that is why we left it open for him to find; if he [132] can get the stuff from Schaub's commercial plant for the lower end of the job, he was free to buy it.

Q. Well, why didn't you leave the entire thing at the option of the contractor and merely set up the quality?

A. Because that isn't the best way to get a specific price on a specific item. It is only when we don't have the source that we have to go the other way.

Q. You could have said that they may use the pit without royalty, and in the competitive bidding that would have developed itself, wouldn't it?

A. No.

Mr. Baskin: Well, may it please the Court, I

(Testimony of Christian F. Wyller.)

am going to object to any further examination along that line, as to why he specified that. The fact is it is in the contract.

The Court: It is not so much what else could have been done but what was done here.

Mr. Stump: I can't understand, your Honor, when they say on this planning that they go ahead now and designate a specific area when their main concern is merely quality. In other words, suppose they designate that you will only use Mack trucks on the job. It would be the same thing. I want to know why they did that.

The Court: Well, but it would be equally irrelevant. For instance, we are not here to investigate the [133] efficiency of the B.P.R. All these acts to which he testified took place before there would be any motive arise to create a favorable situation. That is why it is immaterial.

Mr. Stump: No; it was done afterwards, after the thing was staked, your Honor. That is when the bids were let and after they knew about it, and that is why I can't understand. They make a mandatory provision when their sole interest is the quality of the material to be provided.

The Court: Well, it may be that the contract was entered into afterwards, but, as I understood from the testimony—I might be mistaken—that all the contract does is to put in writing what had already been done preliminarily. Now, I don't know if that is the case or not. You might question him on that aspect and, if the decision to use this par-

(Testimony of Christian F. Wyller.)

ticular place for gravel was made after the staking, why, of course you may bring that out.

Mr. Stump: Well, I think that is answered in the facts of the bid itself, which he stated that they were invitations to bid, were made on July 20th, and he admits they knew at that time, and still they proceeded with a mandatory provision.

The Court: But that may not have been the initiation of this requirement that the gravel be gotten from there. I don't know whether it was initiated with the invitation of bids or preceded it. As I say, all the contract does is to [134] merge into a written document what may have been the result of much negotiating and study and various decisions. I don't know. If you can show that the decision itself to require the gravel to be taken from this particular spot was made after the staking, you may show that.

Mr. Stump: Well, I think a corollary of that would be this, your Honor.

Mr. Baskin: Well, it seems he could just ask the witness the question, and he could answer that question very frankly.

Mr. Stump: Suppose I cross-examine my witness.

Mr. Baskin: You may do that.

Q. (By Mr. Stump): In preparation of the bids, Mr. Wyller, there are many changes and alterations made prior to the time that you make the invitation and state the bids; is that correct?

A. I didn't get that.

(Testimony of Christian F. Wyller.)

Q. In preparation of your bids, when are they finally ready in their final form, at the time you issue the invitation to bid?

A. They certainly have to be final by that time.

Q. By that time they are final. Do you know when they were final in the present case?

A. I couldn't tell you the exact date; no. I don't know. I don't final the bids. [135]

Q. You don't final them. Let me ask you this: Have you let any other contracts in the First Division where you have designated that gravel has to come from a certain location? A. Yes.

Q. Where?

A. Well, the present contract, Reed and Martin contract, stipulated, for instance, that the gravel for the southern portion of the project has to come from Herring Bay pit. It is mandatory.

Q. It is mandatory in that? A. Yes.

Q. You are sure of that?

A. I am sure of that.

Q. And what other ones, where you have designated that it has to come from a certain spot?

A. Oh, I can't recall any offhand right now, Mr. Stump. I don't remember right now, but it is common practice.

Q. Your main concern on this gravel is the quality of it, isn't it, Mr. Wyller?

Q. Quality and quantity.

Q. Yes. I mean, that is your main concern when you let the contract; he has to have gravel of a certain quality. What would be the effect where you

(Testimony of Christian F. Wyller.)
put a mandatory provision in it and the quality went down below that set up by [136] you?

A. When we tell him that is where he is going to get it from, then we have to take what we can get.

Q. Even though we as a people might get a road with below quality aggregate?

A. No; because it will always in every case be the best available.

Q. Well, there are certain minimum requirements that you must have, isn't there, not just the best available?

A. There is quite a wide range in the quality we can use.

Q. I have never seen the plans that accompanied this bid, Chris. I don't doubt your word. I just want to know if you are positive that those plans provided on this case one to be Whipple Creek?

A. Yes; that is positive that Whipple Creek was the source, to be the source, of material for case one borrow.

Q. Was there a map similar to that, or what sort of a designation was made?

A. It is on this plan and profile sheets of the project.

Q. Well, as well as you recollect, Chris, would it be half of this area?

A. It is not designated by any dimensions or by outside boundaries. The area is just indicated as the source of the material that is referred to here to show the spot.

(Testimony of Christian F. Wyller.)

Q. Well, you mean—how is it designated on the plan? [137]

A. The designation of a borrow pit on the plans is a dotted outline of an area and says, "borrow pit," and the creek, if it has a name on it, the name is on it. Sometimes there isn't a name.

Q. And do you know how much that would cover?

A. The boundary is only an indication. It has no bearing on size or courses or anything. It is just a sign, you might say.

Q. In other words, you could secure that on an area outside Mr. Schaub's claim?

A. No, you couldn't because you couldn't work without the creek.

Q. Well, are you planning on three hundred thousand yards washing into there?

A. No. But the area in there is streaky. There are layers of silt. If you can't work the pit with water, you wouldn't get good material. You have got to have water in the pit to work the gravel because you will run into silty streaks that have got to be washed out.

Q. Well, then, you could pipe water in and work in this area outside, could you, from up above the creek? You could, couldn't you?

A. Oh, it physically could be done. I don't know if it could be done economically.

Q. Well, that may be true. Now, you mentioned, Mr. Wyller, [138] a survey of the pit area. You had reference to test holes, did you not?

(Testimony of Christian F. Wyller.)

A. We surveyed the test holes in relation to the creek.

Q. You never surveyed the boundaries?

A. No.

Q. Those were merely laid out on the original survey from the 91.13 acres; isn't that correct?

A. No. We did not have it in the ninety-one-point-some acres. We did not have that available. It was laid out on the basis of the adjacent U. S. Land Office surveys, our own monumented survey of the highway and the survey of the creek showing the test holes and so on. It was all correlated together, and we approved and calculated the outside boundaries of the area that we thought was necessary.

Q. I see. Your survey—merely what you mean is that you made test holes and located them?

A. With respect to the highway.

Q. Yes, with respect to the highway. And nothing was done on the exterior boundaries of the portion involved?

A. No. That was all based on the adjacent U. S. Land Office surveys, which are established surveys, and surveys, established monuments, and our own monumented, established monumented survey of the highway.

Q. Now, this map was made, which is similar to the one and [139] identical with the one in evidence in this case, was made by your office, was it not? A. That is right.

Q. Who placed the road on there?

(Testimony of Christian F. Wyller.)

A. You mean the road into the pit?

Q. Yes.

A. That was placed by my office on the basis of a survey made by Mr. McCann, a party down there.

Q. Mr. McCann made an actual survey of that road, and that is the result of his survey on that?

A. That is right.

Q. Regular field notes made and location of the road? A. That is right.

Q. Now, was that done before, or the original survey? A. How is that?

Q. The original survey was incorrect?

A. The original survey was made before this map was made at all, of course, and then there was another survey made later at the time when the place was claimed or shortly after, and at that time we found there was an error in the original survey as to the relative location of the holes and the road to the main road, and that was correlated.

Q. And you don't know when that was done?

A. I believe it was done in August or so in 1951. I wouldn't [140] say for sure what the date is.

Q. You are personally familiar with the area too, are you not? A. Oh, yes.

Q. Do you think that is a true picture of how far that road goes up there?

A. I imagine the road at times have gone up there. I haven't studied the road when I have been down there, just to see where it ended.

Mr. Baskin: Well, may it please the Court, that matter isn't material. The plat is just up there for

(Testimony of Christian F. Wyller.)

illustrative purposes. The only point that is material is the outside boundaries, and we have agreed that the original chart was shown as——

Mr. Stump: I will withdraw the question.

Mr. Baskin: Well, we agree to explain that point to the Court, but on this map, the creek and road is just pleaded correctly, and in addition we have pleaded the defendant's claim, and only for illustrative purposes.

Mr. Stump: They are claiming the road is development on the appropriation, your Honor.

Mr. Baskin: That is right.

Mr. Stump: And the map is absolutely incorrect on it because, if the ramp goes to this area and that is as far as the road goes—— [141]

The Court: You may ask him how far the road goes. But, if it is incorrect, it has to be in some material respect.

Mr. Stump: Well, it is incorrect in a material respect if they are claiming the road is appropriation because it is the amount done.

The Court: If you want to show that road doesn't go that far, you may do so.

Q. (By Mr. Stump): The ramp is just about halfway up on Mr. Schaub's claim, isn't it?

A. May I go over?

Q. Sure.

A. The ramp would be about in here (pointing on the plat).

Q. Two-thirds?

(Testimony of Christian F. Wyller.)

A. Yes; here. A wide spot is in here, and I have driven up about as far as here personally.

Q. That is all.

A. (Witness resumed the witness stand.)

Q. Now, you mentioned future planned use of projects in which you are going to, which you are going to use the area. Is that the present one; and then what is the next one?

A. The one that is coming immediately now is the three miles of forest development road.

Q. And where is that, what area in Ketchikan?

A. It is an area adjacent to Whipple Creek that is in that same network of development roads that the Forest Service [142] has already built.

Q. Well, do you build those, or does the Forest Service?

A. The Forest Service has built all of the present ones, but this particular program of three miles coming up now we are to build for the Forest Service.

Q. You are now going to build the spur roads for them as well as the main roads?

A. Yes. Not as a general policy, I don't believe. In this particular program of the three miles that is coming up in Ketchikan we are to do it.

Q. You will do that through the Bureau of Public Roads? A. Yes.

Q. And is there a survey made on that?

A. Yes.

Q. And then estimates?

(Testimony of Christian F. Wyller.)

A. I believe the estimates are made; yes. I don't make them myself, I mean my office.

Q. I see. Estimates both on costs and materials?

A. As far as I know. I can't answer definitely on that because it is not in my office.

Q. And money appropriated for it?

A. Yes.

Q. Money is already available for the three miles? A. Yes.

Q. And whose funds are those, yours or the Forest Service? [143]

A. Forest Service funds. They are part of the seven million——

Q. Oh, this is coming out of the seven million?

A. ——special appropriation, but it is a part that the appropriation bill specifically gives to the Forest Service to develop roads, and we have to build a road for them on that program.

Q. And you state that the estimates with regard to gravel are how much?

A. About fifteen thousand yards.

Q. Fifteen thousand yards. You don't know what stage that is in as to being ready to issue invitations for bids?

A. No; I couldn't tell you that.

Q. And the other project?

A. Future project, you mean?

Q. Yes.

A. That is from the end of the present contract, the Manson-Osberg, out towards the end of the present road. Now, as I say, it is not beyond the

(Testimony of Christian F. Wyller.)
state of having been surveyed and some of the design work has been completed, but it is in abeyance for the present time, and it may be several years before we get at it.

Q. And how many yards on that?

A. About seventy-five thousand.

Q. Seventy-five thousand. You haven't requested appropriation for that? [144] A. No.

Q. Then the only one that you know of that you have use would be fifteen thousand yards for the three-mile area; is that correct; plus, say, thirty thousand, you say, that is mandatory under the present contract?

A. That is thirty-six thousand.

Q. Thirty-six thousand; yes. That is all you definitely know of at the present time, Mr. Wyller?

A. Yes; except that I know that it is the only source from which we can get any material within the economic range, and we are going to have a continuous program down there for years to come.

Q. I thought I would be able to tell the Chamber of Commerce about all this road building, but it is only three miles more.

Mr. Baskin: I move that that remark be stricken from the record.

The Court: Yes; it will be stricken.

Mr. Baskin: Now, Mr. Wyller——

Mr. Stump: I haven't finished.

Mr. Baskin: Oh, excuse me.

Q. (By Mr. Stump): You state when you started planning this road in 1949; and when did

(Testimony of Christian F. Wyller.)

you start planning on using the Whipple Creek gravel? A. Almost immediately. [145]

Q. Almost immediately? A. Yes.

Q. And did you have maps of it at that time, in 1949?

A. Map of the Whipple Creek area, you mean?

Q. Yes. A. No.

Q. And had you made any surveys as to the quantity available?

A. Only inspections of it.

Q. Just visual inspections?

A. Visual inspections; yes.

Q. And it was May in 1951 that you put the test holes in? A. May in '50.

Q. May in '50. I see. Well, when did you make a request for the Forest Service to do something so you could use this area, Mr. Wyller?

A. We had discussed it with the Forest Service for several years, about this gravel pit area, and made the first formal request for it to be set aside for public use October, '50, I believe it was.

Q. At which time you wrote a letter to Mr. Heintzleman requesting it. That was October, '50?

A. Yes.

Q. And was this map prepared and reservation made as a result of that request?

A. The map was a little later. [146]

Q. It was a basis of your request to them?

A. Yes. There was more or less continual conference or discussion.

Q. Oral discussion?

(Testimony of Christian F. Wyller.)

A. Oral discussion. But the first formal request, written request, was in October, 1950.

Q. And you didn't submit a chart or make a request—who made the chart on the thirty-seven and a half? Was that made as a result of your request for the area? That is what I want to determine.

A. No, not as a request. I made this request of the Forest Service, advising that it be set aside under regulations, and I wanted them to go further for an absolute withdrawal from any formal—and request that it be set aside formally for gravel purposes.

Q. Then this map was satisfactory to your request? I am talking about area now, Mr. Wyller.

A. Yes.

Q. And this area was a result of your request, the designation? I want to be definite on that point.

Mr. Baskin: Well, may it please the Court, the only area we are claiming is the thirty-seven acres. It is obvious that satisfied their needs apparently. He is just asking, does this area satisfy their request? The only part in litigation is defendant's claim. [147]

The Court: Yes.

Mr. Stump: I will show the materiality of it.

Q. (By Mr. Stump): At the time you made that request didn't you ask them, with reference to the gravel deposit, if it would be possible to open up and locate above the present pit? Didn't you ask them that?

(Testimony of Christian F. Wyller.)

A. If that is what is in the letter, that is what I did.

Q. They designated this as being above the present pit and that satisfied you?

A. No, not at all. That takes in the present pit and nothing more practically. After I made that request and suggested an area above the present pit, I had more studies made and a close estimate of what we would need and what was in there, and we decided there was no need of going above the present pit.

Q. I asked specifically if this designation wasn't satisfactory with your request in the letter; you said, "Yes," three times.

A. I didn't get it that way.

Q. You want to change your answer and say it wasn't satisfactory with your request?

A. I don't get you. I guess I better keep shut up.

Mr. Stump: I would like to move the admission of this contract in its entirety.

Mr. Baskin: I am going to object. [148]

The Court: All the facts that are material are in evidence with reference to that contract.

Mr. Baskin: We are not trying to vary the terms of the contract. It is not in issue.

Mr. Stump: They have requested the use of the contract, evidently trying to prove a point in the case. The contract should be in. I haven't had a chance to study it.

(Testimony of Christian F. Wyller.)

The Court: What is there in it that hasn't been brought out?

Mr. Stump: I haven't had a chance to study it.

The Court: I am not going to search through it for something that might have a bearing on it.

Q. (By Mr. Stump): I would like to ask one other question, Mr. Wyller. The original contract provided for clearing a certain area by the bidder, is that correct, in this disputed thirty-seven and a half? A. Yes.

Q. Nine acres, I believe.

A. Well, there is an item for clearing and stripping the pit for which we pay him on a bid price per acre and a bid price per cubic yard of stripping.

Q. The contract set it up?

A. Yes; and it can be varied almost indefinitely.

Q. It was varied, wasn't it?

A. Well, it hasn't started yet. You can't tell before you [149] get through.

Mr. Stump: That is all.

Redirect Examination

By Mr. Baskin:

Q. Mr. Wyller, you have already stated eight or nine acres is removal of overburden by removal of contractors? A. Yes.

Q. Pursuant to the contract you mentioned?

A. Yes.

Q. And is part of that land covered by the defendant's claim? A. Oh, yes.

(Testimony of Christian F. Wyller.)

Q. Tell the Court whether or not the decision to use Whipple Creek as a source of gravel in negotiating of the Osberg contract was made before June, 1951.

A. Yes. It was planned from the beginning or inception of the project in 1949 and 1950, when the design was made, that we were going to use Whipple Creek. Prior to the fall of 1951, I discussed with the chief design engineer the means or cautions we would have to take to keep the road between there and Whipple Creek in shape for the hauling from Whipple Creek and because of the difficulty of keeping the road in shape because it was not in the original project. It was decided to use Whipple Creek and not to have broken-up roads for the hauling, and the [150] contract would be extended to take in the road to the gravel pit and specifically for the project.

Q. When was that?

A. Final discussion was during the winter of 1950 and 1951, and final decision in 1951.

Q. But prior to that, in May, 1951, you had a special survey made to estimate the amount of gravel for this project?

A. There was never any question but what Whipple Creek would, the gravel would have to come from there.

Q. And that was before 1951?

A. Oh, long before.

Q. Counsel asked you about the request you made to the Forest Service in October. Didn't you

(Testimony of Christian F. Wyller.)
on or about January 31, 1951, or didn't the Bureau of Public Roads file with the Forest Service the amount which was the exterior boundaries of that thirty-seven acres? A. We did.

Mr. Stump: What was the date?

Mr. Baskin: January 31, 1951. You have admitted that.

Mr. Stump: Yes.

Q. (By Mr. Baskin): Now, the contract provides in case one the gravel be obtained from Whipple Creek, and in case two doesn't it provide that it may be obtained from Whipple Creek? [151]

A. Yes.

Q. Have you been notified by the contractor that they intend to use Whipple Creek for case two?

A. I understand they are going to obtain all gravel from Whipple Creek.

Q. How much gravel?

A. About a hundred and fifteen thousand cubic yards.

Q. Mr. Wyller, you mentioned a while ago that when the appropriation was made for the construction of the present highway and the present contract that the plans were complete as of that time, did you not? A. I didn't get that question.

Q. Withdraw that question. Didn't you say that it was certain as near as could be that the road would be built when the Congress appropriated the money for this present construction project?

A. That is right.

Mr. Baskin: And at this time, may it please

(Testimony of Christian F. Wyller.)

the Court, I will ask the Court to take judicial notice of Public Law 45, 82nd Congress, Chapter 121, First Session.

The Court: Give me that again. Are you going to file it?

Mr. Baskin: Yes, I will file it with the Court, but I would like to use it a moment though. I will ask the Court to take judicial notice that the Act was approved June [152] 2, 1951, and that it provided an appropriation of three million five hundred thousand dollars, the Bureau of Public Roads, Tongass Forest Highways, Alaska.

Q. (By Mr. Baskin): Now, Mr. Wyller, was that appropriation, approved June 2, 1951, by Congress, as I have just mentioned, the appropriation for the present construction project to the North Tongass Highway? A. Yes, it is.

Mr. Baskin: No further examination. You may be excused, Mr. Wyller.

Mr. Stump: Just a moment.

Recross-Examination

By Mr. Stump:

Q. I think I understood you correctly, Mr. Wyller; you said that in March of 1951 final decision was made to use Whipple Creek on that project; is that correct?

A. In March, 1951, the decision was made to extend the project within a few hundred feet of Whipple Creek.

(Testimony of Christian F. Wyller.)

Q. And when was the decision made to use Whipple Creek for this area?

A. Well, it was just considered as something that had to be done all the time. There was no decision made on it. It was just the only source. We didn't think of any other place. [153]

Q. What is the cost of that project, that bid, you said?

A. Oh, possibly two million dollars.

Q. Well, do I understand you to say that you had the two-million-dollar project and you had never made a survey of Whipple Creek to determine the amount of gravel there?

A. We didn't have the project. We investigated the pit before we had the plans ready for it.

Q. Well, you didn't make the survey on Whipple Creek until May of 1951?

A. We made a survey of Whipple Creek in May of 1950.

Q. May of 1950? A. That is right.

Q. And based on that, that is when you determined there was adequate there. Isn't there a large body of gravel right down at the mouth of Whipple Creek too, where it goes down on the beach?

A. Yes.

Q. You know about that?

A. Yes. I also know how difficult it is to get at, how costly.

Q. When is the first time there was ever a public proclamation as far as the public being advised as to where the source of gravel would come for this

(Testimony of Christian F. Wyller.)

road? The first time they knew about it is when somebody picked up the specification when you made the invitation and offer for bids in July; isn't that correct, Mr. Wyller? [154]

A. I don't know. I couldn't say.

Q. Well, that is the first time it ever came out in print under your department, isn't it? It was in the specifications?

A. I wouldn't say when it was in print.

Q. Well, I mean, could I have gone up to you and said, "Where are you going to get the gravel from on this project"? A. Yes.

Q. Would you have told me? A. Sure.

Q. I doubt it.

Mr. Baskin: I ask the Court to have that stricken from the record.

The Court: Yes; it will be stricken.

Redirect Examination

By Mr. Baskin:

Q. Mr. Wyller, this gravel pit, this Whipple Creek gravel pit, actually has been used by the Forest Service and the Bureau of Public Roads for their numerous past projects and for all other projects in the future including the present one; isn't that correct? A. That is right.

Q. Now, he asked you about a body of gravel down on the beach. Do you know whether the defendant, Schaub, and his [155] partner, Mr. Zaruba, have already staked that?

(Testimony of Christian F. Wyller.)

A. I understand they already have staked all other sources of gravel in the whole area, including the one at the mouth of the creek.

Mr. Stump: I didn't hear the question and answer.

The Court: You mean the last question?

Mr. Stump: Yes.

The Court: You will have to ask the reporter to repeat it.

Mr. Stump: I just want to ask one more question.

Recross-Examination

By Mr. Stump:

Q. Prior to the time that you make the invitations to bid and put out the specifications, will you give information to any contractor about anything that is going to be in those specifications?

A. To a certain extent; yes. In fact, we have at times, we have pre—what is called pre-advertising when the plans are not finished, but we advise the contractors that a certain project will be called for bids maybe two, three or four months ahead.

Q. I understand; but prior to the time that your specifications are open to the public, those remain a secret, don't they, of which you will not divulge the information to [156] anyone?

A. No. They are not secret. Why should they be secret?

Q. You are answering the questions. Then prior to the time you issue a call for bids and you have

(Testimony of Christian F. Wyller.)

specifications complete, I could go and get any information you have already put into the specifications; is that correct?

A. Anything that will be published when the bids are open, if we know it at the time when you ask us, it could be published.

The Court: Well, I assume you are both through now with this witness?

Mr. Baskin: I am, your Honor; yes.

Mr. Stump: Yes. No further questions.

The Court: We will have to recess this case, I don't know to when.

Mr. Baskin: Maybe it could be Monday.

The Court: We have a jury reporting Monday. I didn't expect to put the jury aside to hear a non-jury case.

Mr. Baskin: Well, I didn't think, your Honor, that it would take very long. I certainly didn't think it would take long today. I figured it would take yesterday afternoon, but——

Mr. Stump: How many witnesses do you have left?

Mr. Baskin: Oh, I have got about two. It just depends on though what the evidence is. I have got several [157] I could call.

The Court: Well, how many witnesses are there altogether? You say you have several?

Mr. Baskin: I say I have two more that I expect to call. I could call two or three others if there is any question about some of the facts, but I really

only expect to call two, at least at this time, may it please the Court.

The Court: Well, I don't know whether I can set aside any time for further hearing either until some time Monday, until I see what develops Monday morning. Court is adjourned to ten o'clock Monday morning.

(Thereafter, Court having reconvened at 1:30 o'clock p.m., January 28, 1952, and thereafter, with all parties present as heretofore, the trial proceeded as follows):

The Court: You weren't through with your case?

Mr. Baskin: No, we weren't, your Honor.

The Court: Call your next witness.

EUGENE W. McCANN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Eugene W. McCann.

Q. What is your position, Mr. McCann? [158]

A. I am resident engineer for the Bureau of Public Roads at Ketchikan.

Q. And how long have you been in that position? A. Since April 25, 1950.

Q. Now, Mr. McCann, did the Bureau of Public

(Testimony of Eugene W. McCann.)

Roads make a survey of thirty-seven acres of land at Whipple Creek during May 16, 1950?

A. They made a soil survey and a survey to tie the soil survey into the existing geological position.

Q. What was the purpose of that survey?

A. To ascertain the quality and quantity of materials that were located in the immediate vicinity.

Q. Was that within the thirty-seven acres that was set aside for the Bureau of Public Roads by the Forest Service? A. It was.

Q. And tell the Court just what that survey or prospect consisted of and the nature of it and the extent.

A. I had orders from the District Engineer, Mr. Wyller, to test the material for quality and quantity and to make a report to him and to transmit field notes showing the location to be platted on the thirty-seven and a half acres that had been platted in Juneau from other records, so I took a survey party out and personally accompanied them, showed them where I wanted the holes dug, made further investigation to satisfy myself that outside the [159] surroundings immediately adjacent to the places that we were going to dig the holes that there was material there. Then I had a survey party come out and make a stadia survey of the locations of the holes and a stadia location of the roadway leading through the area.

Q. Well, now, did the Bureau of Public Roads through you and the other personnel of the B.P.R. prospect that area to see if there was gravel there?

(Testimony of Eugene W. McCann.)

A. Oh, yes. We dug holes——

Q. Tell the Court now the size of the holes, the number of holes and just what you did in prospecting for gravel.

A. We dug holes that were probably three feet by six or eight feet, large enough to accommodate a man, so that it wouldn't get so narrow at the bottom that he couldn't throw the material out and so that he could come out of the hole, and went down as far as fourteen feet.

Q. And that was twenty-one test pits that you dug that way; is that correct?

A. I believe that is right; yes, sir.

Q. And then did you examine the remaining part of that thirty-seven acres to see if it contained gravel?

A. I did. I made a survey of it. There is some gravel that is surface gravel that you can see on the surface, and the country is of such terrain that it rolls, and oxbow lakes had been washed where the old creek had gone out and [160] exposed gravel surfaces.

Q. And that part of that exposure and part of that survey and prospect cover a part or all of the defendant's claim that overlaps the thirty-seven acres? A. It does.

Q. Are you familiar with the fact that the defendant on or about the 22nd day of August, 1950, erected a barricade across the only entrance to that Whipple Creek gravel pit? A. I am.

Q. Tell the Court whether or not that barricade

(Testimony of Eugene W. McCann.)
interfered with or prevented the Bureau of Public Roads in performing its duties and services.

A. It did. I was given orders by my superiors not to enter on the property because of the barricade and because of the "No Trespass" sign until I was given written notice to proceed.

Q. Mr. McCann, have you at any time either staked or surveyed a part of that land for the purpose of removing gravel in connection with the road-building program of the B.P.R. and its contract with Manson-Osberg? A. I have.

Q. What have you done in that regard?

A. I have staked approximately eight acres for clearing and grubbing and stripping.

Mr. Stump: May I ask when that was? [161]

A. I don't have the exact date with me. I have it in my diary. It was sometime this fall. It was just immediately following the injunction.

Q. (By Mr. Baskin): Would you have done that earlier if you had been able to have gone into the area? A. I would have.

Q. So, were you prevented from doing that by reason of the defendant's barricade?

A. I was.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Now, with regard to the size of those test holes, Mr. McCann, did you personally inspect all of them? A. I did.

(Testimony of Eugene W. McCann.)

Q. You located every one of them?

A. Well, I made marks and left them there and explained to the crew about where I wanted them. They might have varied four or five feet; if they hit a root or something, they would move over.

Q. Did you go out and inspect them yourself?

A. I did.

Q. You say you dug down to a depth of fourteen feet?

A. I think you will find that we went as far as fifteen or [162] fourteen feet. That is not in all pits, but that was what we tried to attain—fourteen feet.

Q. You want to tell the Court that you dug holes down fourteen feet? A. That is right.

Q. And what size were they?

A. Well, about three by eight, maybe four by eight, depending on the compaction of the gravel.

Q. As a matter of fact you practically always used pipe that you drove? A. No, I did not.

Q. In none of them?

A. Some of them we did; yes.

Q. How many of them?

A. After we got down as far as we could dig safely, sometimes we drove a pipe, but that was very rarely.

Q. Well, as a matter of fact, mainly the over-burden was taken off and then you reached the gravel and then used pipe?

A. No, that is not true.

(Testimony of Eugene W. McCann.)

Q. And you inspected all those yourself after they were completed?

A. I did. I was there when we gathered the composite sample to send to Anchorage.

Q. Well, at no time to your knowledge, Mr. McCann, did your department ever make any exterior boundary survey on the [163] ground?

A. Not to my knowledge for the exterior boundaries; no, sir. However, there are some of the corners that I am familiar with. The ones along the roadway, I am familiar with the corners in the ground now. I don't know about the back corner.

Q. One other question. Did you make the field notes and place this gravel road on the drawing?

A. I caused them to be made; yes, sir.

Q. Well, you just did this from notes of somebody else?

A. I was present when part of it was run and directed the layout of it; yes, sir.

Q. Do you think this is a true picture of the length of that road? A. May I look at it?

Q. Yes.

A. (Witness approached the blackboard.) It is true, inasmuch as they have drawn these lines in a little too far, but as far as this general location it is true that——

Q. I mean, the length of it.

A. I think it is probably a little shorter than this, but the draftsmen probably drew it right along the line.

Q. I see.

(Testimony of Eugene W. McCann.)

Mr. Stump: That is all.

Mr. Baskin: No further examination. Just a moment. [164]

Redirect Examination

By Mr. Baskin:

Q. Was that survey and prospect made for the purpose of determining the amount of gravel so it could be used on the present road-building program and any future developments in that area?

A. It was.

Mr. Baskin: No further examination.

Recross-Examination

By Mr. Stump:

Q. In May of 1951 you had no determination as to the amount of gravel? A. 1950.

Q. I mean, 1950.

A. Not to my knowledge. There might have been.

Mr. Stump: That is all.

(Witness excused.)

W. A. CHIPPERFIELD

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your name and occupation and position, Mr. Chipperfield? [165]

(Testimony of W. A. Chipperfield.)

A. My name is W. A. Chipperfield, occupation is forester, and my position is in charge of recreation and lands division of the Forest Service.

Q. Are you familiar with the fact that the Forest Service reserved as a public service site ninety-one acres in the Whipple Creek area near Ketchikan, Alaska, in 1940 about September 11th?

A. I am.

Q. Mr. Chipperfield, has that order or that act on the part of the Forest Service, setting that land aside as a public service site, ever been revoked?

A. It has not.

Q. Then is that still in effect then as a public service site, that is, the whole ninety-one acres?

A. It is.

Q. Are you familiar with the order of the Regional Forester, Frank B. Heintzleman, of February 9, 1951, setting aside thirty-seven and a half acres as a gravel pit or source of material for the Bureau of Public Roads?

A. I am. I helped draft the order.

Q. Did that order revoke any part of that previous order setting aside the ninety-one acres?

A. It did not. It was superimposed over that order. It took precedent, but it did not rescind it.

Q. Now, Mr. Chipperfield, insofar as the Forest Service [166] was setting aside this land for, this thirty-seven acres, for the Bureau of Public Roads on February 9, 1951, was that a final order or a final act setting that property aside for that purpose?

(Testimony of W. A. Chipperfield.)

A. Insofar as the Forest Service was concerned in regard to appropriating that area for our use, it was.

Q. And for the use of the Bureau of Public Roads?

Mr. Stump: Mr. Baskin, I didn't get your reference to what order you referred to in that last question.

Mr. Baskin: The order of February 9, 1951.

Mr. Stump: Of the thirty-seven and a half acres?

Mr. Baskin: Yes.

Mr. Stump: That is all. Thanks.

Q. (By Mr. Baskin): Well, that order made it available for the Bureau of Public Roads as well as the Forest Service, did it not?

A. It did. It was chiefly on their recommendation that it was made.

Q. Now, were there any further acts or actions on the part of the Forest Service for that land to be withdrawn? A. There was one.

Q. What was that?

A. That was following our custom, procedure in regards to protecting by formal withdrawals by the Secretary of the Interior of undeveloped areas that we had classified for [167] specific use. In those cases we requested or we recommended to our chief in Washington that he request the Bureau of Land Management to withdraw those areas from mineral location, but that was done chiefly on areas that were undeveloped and we had no claim of appro-

(Testimony of W. A. Chipperfield.)

priation other than the mere fact of classification. There was no physical improvements or anything on those areas.

Q. Now, then, this thirty-seven acres that the Forest Service requested be withdrawn, was that undeveloped or developed land?

A. It was developed both recreationally and prospected and developed for gravel and road-building material.

Q. And was that further effort to have the land withdrawn for the purpose of avoiding possible litigation in the future?

A. That was the only reason.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Davidson:

Q. Mr. Chipperfield, the ninety-one acres recreational order is still effective?

A. It has never been rescinded.

Q. Now, you mean by that the use of that gravel road, continuous of gravel road, won't interfere with that [168] other area?

A. No; not necessarily.

Q. The use of heavy equipment in that thirty-seven-acre area won't interfere with the rest of the other area?

A. You understand that it is classified——

Q. As a recreation area.

A. And also for gravel purposes.

(Testimony of W. A. Chipperfield.)

Q. The thirty-seven is gravel; the ninety-one is not? A. That is right.

Q. Did you propose to use, or the Bureau of Public Roads, use heavy equipment? What I am trying to get at is in fact that ninety-one acres is no longer useful for that purpose because the use of heavy equipment will interfere with the recreation use of the remainder, will it not?

A. No, I wouldn't say that.

Q. This thirty-seven acres will have to be cleared for use of gravel area, will it not?

A. It will.

Q. Won't that interfere with the use of the remaining portion?

A. Not necessarily. It may change the nature of the use, [169] but it would still have recreational values.

Q. All right. Can you identify this?

Mr. Baskin: I would like to examine the exhibit.

Mr. Davidson: This is one you gave me.

Mr. Baskin: Well, I don't know what it is though. Oh, I see.

Q. (By Mr. Davidson): This is a covering letter from Mr. Heintzleman, I take it, to Washington with a letter that was drafted here to be signed in Washington and sent to the Bureau of Land Management? A. That is correct.

Q. And this date was inserted in Washington and the copy returned to you?

(Testimony of W. A. Chipperfield.)

A. That is right. The date is the date the Chief of the Forest Service signed the letter.

Q. This request was to withdraw it from all forms of location and entry, including the mining laws, and, except as herein provided, from leasing under the mineral leasing act?

A. That is exactly what it says, I think.

Q. Right. And it goes on to say: "The land shall be subject to leasing under the mineral leasing laws for their oil and gas deposits provided no part of the surface of the land shall be used in connection with prospecting, mining and removal of the oil and gas."

A. That is a phase that we were required to put in to meet [170] certain requirements.

Q. Now, did the Secretary of the Interior withdraw the land in accordance with that request?

A. No, sir.

Q. He withdrew it in fact——

A. Pardon me. Did you say the Secretary of the Interior?

Q. Yes.

A. He does, I think. I thought you meant the Secretary of Agriculture.

Q. No. The Secretary of Agriculture never took any action on this? A. No.

Q. The Secretary of Interior, you say, withdrew it in accordance with that request?

A. I think he did after he had made the required investigations in regard to it.

Mr. Baskin: Your Honor please, I submit that

(Testimony of W. A. Chipperfield.)
the order itself speaks for itself as to whether it was withdrawn.

Q. (By Mr. Davidson): Well, then, I will ask you again, isn't it a fact that the Secretary of Interior did not make this exception and left the land subject to the mineral leasing act in toto?

A. How was that?

Mr. Baskin: Well, I object, your Honor. That is immaterial anyway. [171]

The Court: It seems to me that is a matter of law.

Mr. Davidson: Well, I would like to offer this in evidence at this time.

Mr. Baskin: Well, I object, your Honor. It is nothing but what the witness has already testified to, the contents of it. It is not material, just a copy of a letter.

The Court: So long as there is no dispute over what was done and it becomes a question of law, then, of course, I wouldn't think there would be any necessity of putting in the record anything of that kind.

Mr. Davidson: Well, your Honor, it is merely one of the administrative steps which the Government admits and in fact asked us to admit that. They made a demand for admission concerning that request. We would be happy to admit it.

Mr. Baskin: Which you have admitted.

Mr. Davidson: We admitted that something was done, and I would like what was done to be part of the record. It is a little difficult, for instance, to

(Testimony of W. A. Chipperfield.)

read the contents of a letter and get the entire picture of what actually was done here without the letter available.

Mr. Baskin: But, may it please the Court, we asked the defendant to admit that the Forest Service sent to the Bureau of Land Management on or about February 13, 1951, a map and a request that the land described in the map be withdrawn. They have admitted that the Forest Service did [172] that and that the letter was received and the map by the Bureau of Land Management between February 13 and March 8, 1951, so that point has been admitted. There is no question about that, and the letter itself is just a letter of transmittal.

Mr. Davidson: The point about it, I think it very clearly shows that the request, this Correction Memorandum, is, as Mr. Chipperfield said quite right, the most they can do by withdrawing the land, and it also shows that they tried to get it withdrawn from the mineral leasing act, and it also shows that the Secretary of the Interior exercised his independent judgment and refused to do so or failed to do so.

The Court: Well, but what of it? It all depends on what he did do and not what preceded it.

Mr. Davidson: Well, it goes to show, your Honor, that this thirty-seven acres did not withdraw it because, if it did do it, this letter shows what they hope to accomplish by that withdrawal and the fact that the final discretion and final power is in the Secretary of the Interior, and, if

(Testimony of W. A. Chipperfield.)
that power was exercised, I think it goes to show that the Secretary of Agriculture and Forest Service don't have that power.

The Court: But their power is not in controversy here. Now, all I am trying to do is to keep the record as brief as possible and to avoid duplication.

Mr. Davidson: There is no duplication about this.

The Court: Now, you have everything in the evidence, [173] as I see it, that would be shown by this, and the fact that the Forest Service, as you intimate, attempted something in which they failed is just simply cluttering up the record and something the Court wouldn't concern itself with anyhow. It is what was finally done by the person having the authority, the Secretary of the Interior, not what somebody attempted to do about it.

Mr. Davidson: Very well. I take it that it is not admitted.

The Court: No. So long as the facts are in the record, why, that is sufficient without duplicating it.

Mr. Davidson: One more thing.

Q. (By Mr. Davidson): This letter to the Bureau of Land Management states it is recommended that you withdraw this area subject to existing valid claims, does it not?

A. It does; I think it does. It should anyway.

Q. Check it.

A. He couldn't do it otherwise.

(Testimony of W. A. Chipperfield.)

Mr. Davidson: Your Honor, I would once again like to have these regulations and policy of the Forest Service offered in evidence and with one further argument, that once this case is over these will no longer be available to me.

The Court: Why don't you have a copy of them made now so you can stick them in your pocket?

Mr. Davidson: All right, if I can make a copy of [174] them now, that is fine. All right.

Mr. Baskin: Well, if you will copy all that is in there, we have no objection. Are you through with the witness?

Mr. Davidson: That is all.

Mr. Baskin: You may be excused.

(Witness excused.)

EINOR H. HYBERG

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Einor H. Hyberg.

Q. What is your position, Mr. Hyberg?

A. At present maintenance foreman for B.P.R. at Ketchikan.

Q. How long have you been maintenance foreman?

A. Oh, acting since October until this past week or two.

(Testimony of Einor H. Hyberg.)

Q. And how long have you been employed by the Bureau of Public Roads in the Ketchikan area?

A. Since 1932.

Q. Are you familiar with the gravel pit known as Whipple Creek gravel pit north of Ketchikan?

A. I am.

Q. Mr. Hyberg, has the Bureau of Public Roads used that pit for the purpose of obtaining gravel in repair and maintenance [175] of the highways?

A. They have.

Q. How long have they been using that pit?

A. As near as I can remember, as soon as the bridge was completed, that we had access to it, why, we have been using it.

The Court: What we want here is the year or the month, or at least the year. Nobody knows necessarily when the bridge was completed.

A. As I remember, it was 1934 when the bridge was completed and so, therefore, it would be from there on.

Q. Up until the——

A. The present time.

Q. The present time. And are you familiar with the claim that the defendant has on that gravel pit, the approximate location of it?

A. Approximately. But I haven't gone over any of the boundary lines or such. I haven't had no occasion to do that.

Q. But you know—you have examined the chart that is on the board there, have you not?

A. I have.

(Testimony of Einor H. Hyberg.)

Q. And noticed the location? A. I have.

Q. Have you since about 1934 removed gravel and sand from within his boundary for the purpose of repair and maintenance [176] of the road?

A. We have.

Q. Could you tell the Court about how often you used that area as a source of gravel material?

A. Well, our heaviest use was in the springtime, at breakup and through the summer, and whenever any contracting was done, why, we tried to get in trucks there to haul along with them. It was very convenient for us and through permission of the Forest Service.

Q. Now, are you acquainted with the fact that the defendant barricaded the only road into Whipple Creek about August 22, 1951?

A. I am aware of that.

Q. And did that effectively prevent the Bureau of Public Roads from obtaining gravel for repair of the highway? A. At that time it did.

Q. Did it require the Bureau of Public Roads to haul gravel a long distance for repair of the road? A. It did.

Q. Where did you have to obtain gravel after that barricade was erected?

A. Well, South Tongass Highway, at the end of the road, Herring Cove Pit.

Q. Then you had to haul gravel from the south of Ketchikan, through the city and up to repair the northern part of [177] the highway?

A. That is right.

(Testimony of Einor H. Hyberg.)

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Where was the first area from which you made use in 1934? That was on the lower side, wasn't it? A. No. It was on the upper side.

Q. At the time of the completion of the road, how many yards of stock piles was left alongside of the North Tongass Highway?

A. In stock piles along the road? Well, I wouldn't know for sure. We used this for maintenance of the road and where it was washed out and, whether there was stock piles or crushed gravel, that is what we covered with.

Q. You couldn't use from this pit for surfacing holes?

A. We have. Since the stock piles of crushed rock were depleted and through the spring breakup, why, that was all we had practically.

Q. There is no other beach that you can go to in that area and get some gravel, no other pit?

A. Not to my knowledge. There is small beaches at various places, but practically depleted now.

Q. What about the pit at Wards Cove? That was available all [178] last fall, wasn't it?

A. That I wouldn't know. It wasn't a place for use with our equipment to get in there.

Q. Well, the contractors had had big equipment in there removing gravel at Wards Cove, hadn't they?

(Testimony of Einor H. Hyberg.)

A. At that time we probably didn't need it.

Q. Then you didn't need any last fall to speak of?

A. Well, we never worked in there last fall. We needed it, but it wasn't available there, and we had other work to do at that time.

Q. You are talking about after the barricade was put up?

A. Well, yes, and previous to that too there was a while that we didn't use it.

Q. Then, there was no particular necessity for the material during that period of the year then?

A. No. It isn't all the time. Of course there is times when the road is frozen you don't need it particularly; spring breakup or through the summers and heavy rains it is urgent to have this so-called gravel and so on for maintenance.

Q. There is an available pit at Wards Cove now, isn't there? A. Yes.

Q. Which is approximately four and a half miles from Whipple Creek?

A. Yes, there is. [179]

Mr. Stump: That is all.

Mr. Baskin: No further examination.

(Witness excused.)

HUGH A. STODDART

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

A. Hugh A. Stoddart.

Q. And what is your position, Mr. Stoddart?

A. Division Engineer.

Q. Who do you work for?

A. The Bureau of Public Roads.

Q. Mr. Stoddart, are you familiar with the Act of Congress known as the Federal Aid Road Act, no, Federal Aid Highway Act, 1950, approved September 7, 1950? A. Yes.

Q. Did that act authorize——

Mr. Davidson: The law speaks for itself.

Mr. Baskin: Very well. May it please the Court, I ask the Court to take judicial notice of Public Law 769, 81st Congress, approved September 7, 1950.

The Court: Can't you give a United States Code citation of that or Statutes at Large? [180]

Mr. Baskin: Chapter 912. It doesn't have the citation there.

The Court: Well, that wouldn't of course. But what I am getting at is that has been issued or published nearly eighteen months ago, and it should be in the Statutes at Large by now.

Mr. Baskin: Well, it should be, may it please the

(Testimony of Hugh A. Stoddart.)

Court. I just didn't have a chance to examine it to see.

Mr. Davidson: I believe it is 23 U. S. Code.

The Court: Well, what is the title of the act?

Mr. Baskin: The title of the act is the Federal Aid Highway Act of 1950.

The Court: Well, then it must be amendatory of existing legislation.

Mr. Baskin: Well, that is true; it is.

The Court: Well, then it certainly should be in the U. S. Code without any doubt whatever.

Mr. Baskin: Well, I don't doubt that. I just don't have the citation here, the U. S. Code citation for it. Section 3 of that Act provides as follows: "For the purpose of carrying out the provisions of Section 23 of Federal Highway Act, 42 Stat. 218, as amended and supplemented, there is hereby authorized to be appropriated," then among other things, "3. For forest highways within, adjoining or adjacent to the Tongass National Forest, the additional sum of three million [181] five hundred thousand dollars for the fiscal year ending June 30, 1951, and a like sum for the fiscal year ending June 30, 1952, to provide for the improvement and extension of the highway facilitates to serve the present and potential traffic incident to the further development of timber and other resources of Southeast Alaska."

Q. (By Mr. Baskin): Now, Mr. Stoddart——

The Court: Is that the only part of the Act that you wish the Court to take judicial notice of?

(Testimony of Hugh A. Stoddart.)

Mr. Baskin: Yes, may it please the Court, it is.

Q. (By Mr. Baskin): Mr. Stoddart, you heard me read this Act of Congress and was that, did that Act authorize the expenditure of money and for the construction of the present road-building program of the North Tongass Highway which is being constructed by Manson-Osberg Company?

Mr. Stump: May it please the Court, I think I should object to that. As I understand the question, it is: "Does that Act authorize the present Manson-Osberg contract?" Well, all you have to do is read it to tell whether or not it authorizes that.

The Court: Well, I don't think any act would ever authorize any specific contract. The question would be, it seems to me, whether a specific contract was let under the authority of some act.

Mr. Baskin: May it please the Court, I will withdraw [182] the other question.

Q. (By Mr. Baskin): Mr. Stoddart, was the present contract with Manson-Osberg Company for the construction of the highway, the North Tongass Highway, let pursuant to the provision of this, the authority contained in the Act I just read?

A. I might say it is pursuant to the appropriation made following that authorization.

Q. Very well.

Mr. Baskin: You may examine the witness.

Cross-Examination

By Mr. Stump:

Q. Mr. Stoddart, there was nothing in that Act that made it mandatory on your department to

(Testimony of Hugh A. Stoddart.)

build any specific road as long as it was within the authorization of the Act and a Forest Service road; isn't that correct? A. That is right.

Q. And, however, as a result of this, you did complete specifications on this present contract which you let? A. Yes, sir.

Q. And when were the specifications received; do you know?

A. I couldn't say exactly; sometime in the spring of 1951.

Q. And you had the money when?

A. June 2, 1951. [183]

Q. And when did you call for the bids?

A. I couldn't answer without reference to the record.

Q. Well, was it in July; do you remember that?

A. Yes, it was.

Q. The latter part of July?

A. I believe so. I think Mr. Wyller has given the dates on that already.

Q. Yes. And do you know the reason why, if you had the money and the specifications——

Mr. Baskin: Well, I will object to that, may it please the Court.

Mr. Stump: He can't object until I ask the question, your Honor.

The Court: Well, you may finish the question.

Q. (By Mr. Stump): You had the money by June 2, you say, of 1951? A. Yes.

Q. And the specifications already prepared.

(Testimony of Hugh A. Stoddart.)
Why did you wait so long to advertise that after you had it available?

Mr. Baskin: Well, I object. It is immaterial.

The Court: It is immaterial. Objection sustained.

Q. (By Mr. Stump): And the dates that Mr. Wyller gave with regard to the letting of the contract, invitations for bids, are correct?

A. Well, I think he referred to the record. I am sure they [184] must have been.

Redirect Examination

By Mr. Baskin:

Q. Mr. Stoddart, were the specifications for the building of that highway completed prior to June 21, 1951? A. I couldn't answer that.

Q. Well, I believe you said they were completed during the spring of 1951?

A. I think they were but I couldn't answer that question without referring to the record.

Q. Very well.

Mr. Baskin: No further examination.

(Witness excused.)

Mr. Baskin: May it please the Court, I am going to ask the Court to take judicial notice of all of the annual appropriation acts of Congress since 1934 for the United States Forest Service and the Bureau of Public Roads. I have had all of those statutes compiled once. I don't seem to find it. I will prepare it and insert it in the brief.

The Court: Well, is there some particular parts

of these appropriation acts that you wish the Court to take judicial notice of?

Mr. Baskin: For the appropriation for the construction, maintenance and repair of the highways in the Tongass [185] National Forest. The Government rests, may it please the Court.

Mr. Stump: At this time the defendant would like to move to strike from the complaint the request for damages because there has been a total lack of proof of any damages plaintiff has shown in the case, your Honor.

The Court: Have you anything to say about that?

Mr. Baskin: Well, may it please the Court, we do allege that we have been damaged and, while this is a continuing trespass, we have shown the Government has been denied the right to use the property by the witness Hyberg and all of the others during the time that the defendant had the barricade there and, while we haven't shown in dollars and cents, we have shown that we have been damaged sufficiently to warrant this Court to enter a permanent injunction.

The Court: That isn't of course what I am interested in. I thought from the motion that there was a prayer for damages in a specific amount. Is there anything like that?

Mr. Baskin: No, may it please the Court, there isn't. We asked for damages but we——

The Court: Then of course the motion is denied.

Mr. Davidson: At this time we would like to make a motion, your Honor, to dismiss this action

on each ground of appropriation as alleged and proven by counsel. It doesn't constitute an appropriation of this land barring mineral entry [186] under the law. I am prepared to argue each separate ground in the complaint, the ninety-one-acre appropriation, the thirty-seven-and-a-half-acre appropriation, and the use, which, as far as I can see, are the only claims the Government put forth here.

The Court: I will reserve ruling on that.

Defendant's Case

H. F. SCHAUB

called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Stump:

Q. Will you state your name?

A. Herbert F. Schaub.

Q. And where do you live?

A. Ketchikan, Alaska.

Q. And what is your business?

A. Sand and gravel and prefabricated concrete products.

Q. Were you in the sand and gravel business prior to the time of your present business?

A. I was.

Q. When was that?

A. In 1940, at Boca de Quadra, furnishing sand

(Testimony of H. F. Schaub.)

and gravel to the United States Engineers at Annette Island.

Q. You had a mineral claim? [187]

A. A mineral claim, placer claim.

Q. And when did you take over your present operation, Mr. Schaub?

A. Approximately April, 1950.

Q. And that is in Ketchikan?

A. That is in Ketchikan.

Q. And do you operate that as owner, or how?

A. I operate that as a leaser.

Q. Do you lease it from somebody?

A. I lease it.

Q. And from whom?

A. I lease it from Alaska Concrete Products Corporation. I am a subleaser.

Q. And where is your source of supply for material there?

A. In the tidelands and in the channel of Tongass Narrows.

Q. Do you also operate a cement block plant for making building blocks?

A. Yes. We have a complete building block machine and equipment and also a batch plant for producing ready-mix concrete.

Q. Is there any other similar business operating in Ketchikan? A. No.

Q. Now, Mr. Schaub, at the time you went into business in 1940 did you prospect at Ketchikan and adjacent area for sand and gravel?

A. I did.

(Testimony of H. F. Schaub.)

Q. Did you go out to Whipple Creek at that time? [188]

A. Yes. We looked Whipple Creek over where the bridge is and where this deposit in question is and also at the mouth of Whipple Creek and also looked all up the channel, clean up to Burrows Bay. That was the time the United States Engineers was vitally interested in material for the runways.

Q. At Annette Island?

A. At Annette Island.

Q. Now, Mr. Schaub, at the present time have you estimated the source of supply available in your present operating site? A. I have.

Q. What is that approximately?

Mr. Baskin: Your Honor, I don't see—go ahead. I will withdraw it.

A. My personal estimate is possibly sixty thousand yards left to be removed, and that is corroborated by the City Engineer's estimate.

Q. (By Mr. Stump): Did you have him survey it and estimate it?

A. He has surveyed the land; yes.

Q. What is the status of that land at the present time as to ownership?

A. Well, I have a lease, and in this lease of mine there is a clause there granting the Spruce Mills the right to go in there at any time and construct a dock on the tidelands, [189] and the minute they walk in there, why, I am out of business.

(Testimony of H. F. Schaub.)

Q. Who presently is claiming ownership to that sand and gravel?

A. I believe it is the Bureau of Land Management.

Q. Have you requested that it be put up for sale by bid? A. I have.

Q. And that is pending at the present time?

A. It is now pending, and I cannot remove any material there now.

Q. Have they told you you are a trespasser?

A. A trespasser.

Q. Now, Mr. Schaub, is there any other known source of supply for you to continue in business with that can be economically operated that you know of other than Whipple Creek?

A. That is the only source that is in a reasonable length or distance to town that you can economically produce sand and gravel aggregates for Ketchikan.

Q. Now, with regard to the type of material in Whipple Creek, have you had any test made on it?

A. I have.

Q. Test for what?

A. Tests mainly for aggregates for the production of concrete. We have had that tested by the Northwest Testing Laboratories in Seattle.

Q. And what was the result of the test? [190]

A. They have approved the material. It passes standard specifications.

Q. And with regard to your present material in

(Testimony of H. F. Schaub.)
making building blocks, how does Whipple Creek compare with that?

A. It will be able to produce building blocks very satisfactorily, which at the present I cannot produce any building blocks. They don't meet the public demand. They are poor in quality and poor in color. People don't like them. My block plant now, which I have invested possibly ten thousand dollars in, is practically idle. This material at Whipple Creek is—or at Quadra—where I am at now it is dark-colored, stained and makes an awful poor muddy-looking block, and it does not meet the requirements of the public.

Q. Have you purchased any equipment to go into Whipple Creek? A. I have.

Q. It is available now?

A. I have some of the equipment on the job now at my preesnt plant, and I have tentative arrangements in the States with various machinery houses for equipment for Whipple Creek.

Q. Now, Mr. Schaub, do you know what the needs of Ketchikan are on planned construction for the coming year or year and a half on the road programs, schools, and so forth and so on, with regard to cement and other aggregates used in building material? [191] A. I do.

Mr. Baskin: May it please the Court, I am going to object to that unless it is confined to Government construction. I don't see where the general needs of a community has any relationship as to whether or not the Government has appropriated this land for its own use or not.

(Testimony of H. F. Schaub.)

The Court: Yes; I rather think so, too.

Mr. Stump: Well, all the city work, your Honor, is with public participation.

The Court: But how would it make any difference here, in determining who has the right to this particular tract of land, what the demand is? It seems to me it wouldn't have the slightest tendency to prove any issue in this case.

Mr. Stump: It would, your Honor, go to the question of good faith that they have raised in this case.

The Court: No. The good faith, as I see it, wouldn't depend on the demand. I don't think there would be any controversy over the fact that there is a demand for sand and gravel. The good faith, as I understand it, comes in here because of the imputation or inference perhaps on the part of the Government that it was after it had gone in and made certain explorations that their land was in effect jumped. The matter of demand for the material wouldn't throw any particular light on good faith.

Mr. Stump: Well, it would to this extent, [192] your Honor, if his present supply was very questionable on the thing, his testimony with regard to his need, which would have something to do with the value of economically operating from Whipple Creek. In other words, the minute the one source of supply is dropped out, maybe it would be more costly to operate there, but it would be cheaper than doing it some other way, so, as far as the

(Testimony of H. F. Schaub.)

exploration and discovery of it, he has already stated he knew about it in 1940 and went there and inspected that deposit and another one before going into this one.

The Court: Well, I think it can be assumed here, and I don't think there is any dispute about it or could be any dispute, that there is a demand for sand and gravel, and it may be considerable, but the view I take of it is that it wouldn't tend to prove or disprove the question of good faith.

Mr. Stump: Well, they have raised the inference, your Honor, that because of the proposed road Mr. Schaub went out and staked out this gravel claim. The proposed road isn't the reason, your Honor. He is liable to lose his present pit; he has been told it belongs to the Government; and, if he does, certainly he is justified in looking for another source of supply regardless of the timing on it, your Honor.

The Court: Well, the position, as I see it, that is taken by the Government is not that there is no demand, not that he wasn't put in the position himself where he had to [193] find another source of supply, but that he seeks to take advantage of their exploratory acts and, so to speak, their discoveries, and the exact extent of the demand for gravel would be immaterial on that question.

Mr. Stump: Well, if it is just relegated to the fact of their discovery, if that is the Court's thought on it, why, I would agree with the Court on that.

(Testimony of H. F. Schaub.)

Q. (By Mr. Stump): Well, Mr. Schaub, you stated in 1940 you went into the Whipple Creek area and prospected that for sand and gravel?

A. That is right.

Q. And at that time was it your intention to bid on a contract let by the United States Army Engineers for furnishing aggregate for the surfacing of the Annette Airfield? A. That is right.

Q. And how much of an investigation did you make of the Whipple Creek area?

A. Well, I traced Whipple Creek up from the mouth of the creek until we come to the falls there, and then I detoured on up to the road where the new bridge was put in, as I understand, around 1934, prior to my time. Deposits were very evident along the river channel, the creek channel, with ample supply of sand and gravel clean on up for a distance of approximately twenty-five hundred, three thousand feet from the bridge. [194]

Q. Did you go on up the creek?

A. I walked clean up the creek. I have been clean back in the back end of that many times on hunting expeditions and know the deposit was there, and, seeing these past operations in the year, there was no need for me to do any exploration work. There is pits as deep as twenty-foot, fifteen or twenty-foot deep, where the past contractors, private contractors, had been working. There is ample supply there, without going out and making any test holes, to meet the requirements that are now faced in Ketchikan.

(Testimony of H. F. Schaub.)

Q. Did you discuss with the three contractors, that worked in the area prior to the time you located it, the question of the amount of supply available there?

Mr. Baskin: Well, I object. That would be hearsay.

Mr. Stump: I just asked him if he discussed it with them. I didn't ask him what he said.

The Court: I think that the available supply of sand and gravel is rather immaterial.

Mr. Stump: Well, your Honor, as far as the discovery itself is concerned seeing it in the river bed is adequate for a discovery or seeing it on a bank. I mean, your discovery in a mineral location, your Honor, doesn't answer all the questions as to whether or not you have discovered it, and——

The Court: Well, but how would the extent or quantity of sand and gravel tend to prove or disprove any issue? [195]

Mr. Stump: Well, it would tend to prove that he had prospected, had known that it was available and in rather large quantities from what——

The Court: He doesn't have to prove that there was a large quantity. All he needs to prove is that he prospected and discovered gravel. Now, the exact amount or the fact that there was a large quantity, if that is a fact, or a small quantity would be rather immaterial.

Mr. Stump: Very well. I will withdraw the question.

Q. (By Mr. Stump): Mr. Schaub, at the time

(Testimony of H. F. Schaub.)
you made your location discovery on there, where did you go and what did you do and what did you find?

A. Well, knowing this deposit was there, I followed all up to the creek, put our discovery post approximately fifteen hundred feet, thereabouts, from the bridge so we wouldn't interfere with any road construction if that road was widened, approximately fifteen hundred feet from the bridge on basically the stream bed, but it was only the stream bed at flood stages. We went off to one side where there was an ample deposit showing and we put our discovery location, discovery notice——

Q. When you speak of "we," who is "we"?

A. I had a witness along with me—Mr. Zaruba. I looked at this deposit prior to taking Mr. Zaruba out there to witness the location and to witness the markings on the claim, [196] and I picked up or secured a piece of cedar there, probably four, five or six inches in diameter and attempted to write the notices of the location on there, the discovery, and we stepped out our distances and seen where we wanted to go, and I went into town, seeing there was nothing available outside of going to a lot of work chopping down trees and branches to make our location notices. I called up McGillvray Brothers and told them to cut me up some stakes about four feet long and approximately three inches in diameter; it wasn't necessary to buy new lumber; but to give me some stakes that would be somewhere near those measurements.

(Testimony of H. F. Schaub.)

Q. And are those the stakes that you used in making your location?

A. Those are the stakes which we used and which are still there on our location.

Q. Well, now, at this place of discovery was the stream bed there wider from the floods in there than was being used by the water in it at that time? A. Yes, sir, considerably.

Q. Considerably wider? A. Yes.

Q. And was that stream bed composed of sand and gravel?

A. Approximately the whole length of the claim.

Q. And at the point where you made your discovery, after you [197] put up this location or discovery post, and then when did you stake out the corners?

A. We put this one post up about two days before we completed our staking. We had to go through the woods there and take our measurements to the various posts and brush out our lines, and that is what we completed, and I put in my other stakes after finding an ample deposit there at my discovery, which is very clearly defined; I put up this rough stake, and then I asked the contractor, McGillvray Brothers, to make me some new stakes, at which time we went out with a tape and measured off our distance with a tape and compass. That time we went back, we put in a little cut post which was cut by McGillvray Brothers in place of the other post, which was very hard on the original post to read, and put it right alongside

(Testimony of H. F. Schaub.)

of it. I don't know if that post is still there or not. I imagine it is.

Q. And did you file a location notice?

A. At that time, why, upon completing our boundary lines and our four corner stakes and attaching our notice to the claim, which I believe was the 21st of June when we completed it, constituted our location.

Q. I will ask you to tell me what this is?

A. That is a notice for location of a placer claim.

Q. And who made it? A. I made it. [198]

Q. And is this the same one you made and filed and recorded in this case?

A. This is a duplicate copy, and the original copy is filed in the Recorder's Office.

Q. Is this the original copy?

A. That is the original copy.

Mr. Stump: I would like to introduce this as Defendant's Exhibit No. 1.

The Court: It may be admitted and marked Defendant's Exhibit A.

DEFENDANT'S EXHIBIT A

Notice of Location of Placer Claim

Notice is hereby given that the undersigned, having complied with all the requirements of the law and with local customs and regulations, has located and claimed 20 acres of placer mining ground.

This claim shall be known as the Whipple Creek

(Testimony of H. F. Schaub.)
No. 1 placer claim. The point of discovery whereon this notice is situated is: Approximately 1500 feet upstream from bridge in stream channel on the left hand side looking upstream which is discovery post No. 1 and from thence the boundaries of said claim are marked and described as follows:

Commencing at the discovery post and running thence SE 450 feet to Post #2; thence SW 1300 feet to Post #3; thence NW 600 feet to Post #4; thence NE 1300 feet to Post #5; thence SE 150 feet to Post #1.

This claim is located in the Ketchikan Mining District, Territory of Alaska, and situated about 9 miles north of Ketchikan on the North Tongass Highway.

Discovered June 21, 1951.

Located June 21, 1951.

/s/ H. F. SCHAUB,
Locator.

Witnessed:

/s/ C. A. ZARUBA,

/s/ W. C. STUMP.

Received in evidence January 28, 1952.

Q. (By Mr. Stump): Mr. Schaub, is Whipple Creek—can you see it from driving along the regular road there? A. Oh, yes.

(Testimony of H. F. Schaub.)

Q. And what is the bed of the stream composed of? A. Sand and gravel.

Q. It is visible to the naked eye?

A. Yes. You can look up that stream, oh, about a thousand feet, I would estimate.

Q. And the whole bed is sand and gravel?

A. That is right.

Q. Is it a matter of common knowledge that it has been used for taking sand and gravel in the past? A. That is right.

Mr. Stump: That is all. You may cross-examine.

The Court: I think we will recess at this [199] point.

(Whereupon Court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore; whereupon the trial proceeded as follows):

Cross-Examination

By Mr. Baskin:

Q. Now, Mr. Schaub, in 1940, when you went up to see that land, how far could you see up that creek from the bridge?

A. Oh, back in 1940, that is a long ways back.

Q. How far from the bridge could you see up into that area?

A. Well, I wouldn't attempt to say how far; nothing like you can see up there now.

Q. No, you couldn't, could you? It was all tangled with brush and trees and underbrush?

(Testimony of H. F. Schaub.)

A. That is right.

Q. In fact from the bridge you could only see a short distance up there?

A. Oh, you could see up there——

Q. Two hundred and fifty, three hundred feet?

A. Maybe two hundred, maybe three hundred feet. I have been all through that area many times in the past.

Q. Now, do you have any other claims down there? Have you staked any other claims in the vicinity of Ketchikan?

Mr. Stump: May it please the Court, I will have to object to that unless I understand what the materiality is. [200]

Mr. Baskin: Well, he testified about no other sources available, and we have a right to know whether he has got any other claims; just testing the good faith of this defendant in this case.

The Court: Objection overruled.

Q. (By Mr. Baskin): Have you got any other claims? Have you filed any other mining claims or posted any other mining claims in the vicinity of Ketchikan?

A. No, not in the vicinity of Ketchikan. I have one at Quadra.

Q. You have one at Quadra. Now, where else do you have a claim? A. Do I have a claim?

Q. Yes.

A. I have a claim at Wards Cove Lake now.

Q. All right. Where else do you have one?

A. That is the only claim I have, sir.

(Testimony of H. F. Schaub.)

Q. And have you got one in Martin Arm? Is that Boca de Quadra?

A. That is Boca de Quadra claim.

Q. And any other place? Ward Lake, have you got a claim there?

A. I just mentioned that.

Q. And you had that claim here during the summer too, didn't you? When did you stake that claim? A. Which claim is that?

Q. At Ward Lake.

A. We staked that claim, I believe, in August of last year. [201]

Q. And at the same time that you had a barricade on the Whipple Creek claim you had a barricade on the Ward Lake claim, too, didn't you?

A. Yes. We put the barricade on the Ward Cove Lake the latter part of August, September, thereabouts.

Q. And isn't it a fact that the Government has removed gravel from that Ward Lake pit over a period of years? A. Ward Lake pit?

Q. Yes. A. No.

Q. Well, there is a gravel pit there, isn't there? Isn't there some kind of a gravel pit at Ward Lake?

A. Yes; there is a pit there where the past contractors removed some material out of it.

Q. Well, he was a contractor for the Government, wasn't he? A. That is right.

Q. All right. And isn't it a fact that you and Zaruba posted a claim on the Herring Bay pit that was being used by a Government contractor?

A. No, sir.

(Testimony of H. F. Schaub.)

Q. Didn't Zaruba post one there?

Mr. Stump: I object, may it please the Court.

A. No, sir.

Mr. Stump: Just a minute, until I make my objection. I don't see what materiality this has, where a third party [202] posted some claims.

The Court: Unless you can show that they were engaged in a common enterprise, why, it would be irrelevant of course.

Q. (By Mr. Baskin): Aren't you and Zaruba partners in a business of sand and gravel?

A. No. We have been very close together and been in several businesses in years gone by.

Q. All right. What kind of business has it been?

A. Oh, real estate, buying and selling of boats.

Q. Well, you are familiar with the Herring Bay pit that the contractor for the Government has removed gravel in connection with the road construction down there in the south of Ketchikan, aren't you?

Mr. Stump: Well, I will renew the objection, may it please the Court.

The Court: This apparently is a preliminary question. I don't know what the next one is going to be. It is plainly preliminary.

Q. (By Mr. Baskin): Well, did you put a "No Trespass" sign up at the Herring Bay pit?

A. I didn't.

Q. Did you have somebody do it for you?

A. No. I didn't locate Herring Bay pit.

(Testimony of H. F. Schaub.)

Q. But you know that Zaruba claims that pit, don't you? [203]

A. No; Mr. Zaruba is not the locator of Herring Cove pit.

Q. But he claims to be the owner of it, doesn't he? A. He is the owner of it now, I believe.

Q. And he had somebody else to stake it for him, didn't he? A. Yes.

Mr. Stump: May it please the Court, I am going to object to all this questioning.

The Court: Yes; unless you should ask the witness first whether he is interested in that particular claim out there before asking these questions.

Q. (By Mr. Baskin): Well, are you interested in that Herring Bay pit?

A. No, sir. I have no interest in the Herring Bay pit.

Q. Do you have a partner, or anybody that is in a business enterprise with you, interested in it?

A. No, sir.

Q. Now, then, you stated that the Boca, that you have a claim at Boca de Quadra?

A. That is right, sir.

Q. Is that on Martin Arm?

A. Martin Arm.

Q. And isn't there a big barge that is broken up right in front of that pit where you obtain gravel there? A. No, sir.

Q. Isn't there a big barge that is stationed right at the —— [204]

A. There is a big barge in there; that is true. It

(Testimony of H. F. Schaub.)

used to belong to the Government. They broke it when they brought materials up there several years ago, but it doesn't interfere with the operation of my pit.

Q. I don't contend that. I am just trying to identify that. I have been down there. I just wanted to know if that is the right one.

A. That is right.

Q. And isn't that sand and gravel in the side of a bank alongside that river?

A. Sand; glacial deposit.

Q. Light colored, white sand that is there?

A. That is right.

Q. Didn't you say that made the blocks too dark, much darker than sand?

A. No, sir; I didn't. I said the sands coming out of my present pit that I am now operating in the City of Ketchikan makes very poor blocks.

Q. What about Boca de Quadra; would it make good block?

A. It would make a beautiful block.

Q. How long have you lived in Ketchikan?

A. Well, permanent residence there about 1939. I headquartered in Ketchikan from about 1937.

Q. You stated that it was common knowledge that this Whipple Creek gravel pit was used as a gravel pit, didn't you? [205]

A. Well, I would like to answer that in this way.

Q. Well, I am asking you to state what you stated a while ago. Didn't you say that it was com-

(Testimony of H. F. Schaub.)
mon knowledge that it had been used as a gravel pit? And you knew that, too?

A. That is right; it was used as a gravel supply.

Q. All right. Call it supply or pit, whatever you wish. You also knew that, didn't you?

A. Yes, sir.

Q. And didn't you in conversation with Mr. McCann, who testified a while ago, during September, August and September, of 1950 learn that the Government was going to construct a highway north of Ketchikan and was going to use this Whipple Creek gravel pit as a source of supply?

A. Well, I don't remember if it was definitely decided whether they were going to use gravel out of Whipple Creek for the source of supply.

Q. But you did have a conversation or several conversations with Mr. McCann during August and September of 1950 regarding the construction of the road, didn't you?

A. That is true, very true.

Q. And you know they were building a bridge during about that time, don't you?

A. Yes; they were constructing a bridge at Wards Cove.

Q. And didn't he tell you on one or several occasions that the Government was going to construct the highway and that [206] they were going to use gravel from the Whipple Creek gravel pit?

A. No, I won't say that. We knew they were going to construct a highway.

Q. Well, do you deny that he told you that they

(Testimony of H. F. Schaub.)

were going to use gravel out of the Whipple Creek gravel pit for use in constructing the road?

A. I will say it was general knowledge that it was going to come out of Whipple Creek.

Q. All right. And you knew it, too, didn't you?

A. Probably. I don't say it was definitely coming out of the gravel pit.

Q. But you knew that they were going to obtain gravel from Whipple Creek in constructing the road, didn't you?

A. I imagine a portion of it would come out of there; yes.

Q. And you knew that back in 1950, during August and September of 1950?

A. I don't know about the time.

Q. Well, during the latter part of 1950?

A. I imagine it was around that time; yes.

Q. All right. You wouldn't deny that it was during the latter part of 1950 that you knew that, would you?

A. It must have been the latter part of 1950 or early part of '51 while the construction was on by Reed and Martin.

Q. Very well. Now, how far out is Whipple Creek from Ketchikan, [207] about how far?

A. I believe it is nine miles.

Q. Isn't it in fact closer to ten or eleven?

A. I won't argue the point. Approximately nine miles from the city limits.

Q. Well, if it is shown to be, that is, if actually

(Testimony of H. F. Schaub.)
there is a milepost of about twelve miles there, you wouldn't dispute that, would you?

A. Well, if the milepost says twelve miles, it must be twelve miles. Now, is that from the center of Ketchikan?

Q. Well, I think that is the fact, Mr. Schaub. Now, what is the distance of Ward Lake pit from Ketchikan?

A. Four and a half, oh, six, seven miles, probably eight. I live at four-and-a-half mile and I think it is probably twice the distance.

Q. And you have a claim on that pit, do you not? A. Yes.

Q. You and Zaruba?

A. No, not me and Zaruba.

Q. Well, didn't Zaruba have a claim on there, and then you went on and staked it?

A. Zaruba had a claim on there which was filed approximately in August, and we found that we would probably interfere with the camp stoves and camp sites, and so we relocated, Mr. Zaruba and I, we relocated the claim. [208]

Q. All right. And then didn't he come back and relocate his claim again?

A. I believe he has.

Q. So, you have actually staked that Ward Lake pit three times. He staked it once, and then you and Zaruba staked it, and then he staked it again; isn't that right? A. That is right.

Q. And that pit is six or seven miles from Ketchikan? A. Six or seven.

Mr. Baskin: No further examination.

(Testimony of H. F. Schaub.)

Redirect Examination

By Mr. Stump:

Q. Mr. Schaub, you do own the claim at Boca de Quadra that has the good sand that you spoke of? A. That is right.

Q. Why don't you use it in making blocks now?

A. The cost of getting it into town is prohibitive.

Q. I see. When was the first time, Mr. Schaub, that you had positive proof that the Bureau of Public Roads were going to use Whipple Creek?

Mr. Baskin: Well, I object to that, your Honor. He stated he had knowledge of it in the latter part of 1950.

Mr. Stump: He didn't say that he—he said he heard talk about it; he had no definite [209] knowledge.

The Court: Well, he may explain his answer of course if he wishes to.

A. I didn't know it was definite until I seen the bids.

Q. (By Mr. Stump): The specifications?

A. The specifications.

Q. Did you ever have a talk with a superintendent of any contractor that was bidding on it and did he state how he would get his material?

A. That is right. I had a talk with Mr. Ray Ravelle, who was superintendent for Morrison-Knudsen.

Q. Who bid on the job?

(Testimony of H. F. Schaub.)

A. Who bid on the job; and he told me, if he was successful, he would——

Mr. Baskin: Well, I object——

A. ——prepare to quarry it.

Mr. Baskin: Wait just a minute. I object to him stating hearsay testimony, may it please the Court.

The Court: Yes. The objection is sustained.

Mr. Davidson: Your Honor, it is not hearsay. It is a matter of knowledge. He is not testifying as to the truth of the statement but what he was told as to his knowledge. He is not testifying that Morrison-Knudsen would use rock pressure. He is testifying that the best of his knowledge was that they would use rock pressure.

The Court: Well, that is rather debatable. If that [210] is the purpose of it, of course it would be admissible, but from the way the question was asked and answered it looked like——

Mr. Stump: Well, I will reframe the question.

Q. (By Mr. Stump): Did you know how one of the bidders who bid on the job contemplated getting their aggregate for their surfacing?

A. I did.

Q. And how were they going to get it?

Mr. Baskin: Well, I object——

A. Crush it out of the quarry.

Mr. Baskin: ——it is hearsay, may it please the Court.

The Court: Yes. It is just the very point that I made here. It now becomes hearsay.

(Testimony of H. F. Schaub.)

Mr. Davidson: Your Honor, the point he asked is, did he know they were going to use rock pressure?

The Court: Yes; but that isn't the question nor answer. That is the trouble. You have made a sound objection if it were addressed to evidence of that kind, but it isn't. It is a matter of—he wants to prove when he acquired knowledge. Of course he can prove it by something of that kind, and then of course the inquiry is not as to the truth of what was said but to the fact that he obtained notice there.

Mr. Davidson: That is right.

The Court: But that isn't what his answer [211] was.

Mr. Stump: Very well. I will ask the question.

Q. (By Mr. Stump): Did you know how Morrison-Knudsen, Incorporated, one of the contractors who bid on the job, how they were going to secure their surfacing if they were successful?

A. I did.

Q. How were they going to secure it?

Mr. Baskin: Well, just a minute. I object to that.

The Court: We are right back to where we started from. That is plain hearsay. Objection sustained.

Mr. Baskin: And besides, Morrison-Knudsen is not shown to have obtained, even bid, or at least had a bid accepted for construction work in this present project or any other project.

(Testimony of H. F. Schaub.)

The Court: Of course we don't have to quibble much over the admissibility of anything here where there is no jury. The Court over objection will not consider hearsay, but without objection he will consider it.

Mr. Davidson: Your Honor, the question is, did you have knowledge of any other way to get sand and gravel, and can be answered, I think.

The Court: That isn't what he was asked. The question called for a hearsay answer and elicited a hearsay answer.

Mr. Stump: Well, let me ask this.

Q. (By Mr. Stump): Were there other methods of securing the aggregate in the Ketchikan area other than from the Whipple [212] Creek pit?

Mr. Baskin: I object to that, may it please the Court. If there were, then why shouldn't he go out and get it at some other place other than Whipple Creek, but that isn't material. He testified here a while ago that there were no other sources of material, and now he is testifying that there are, and counsel is either impeaching his witness or he is bringing in matters of fact that are irrelevant and immaterial and which he has been told.

The Court: Well, you are not going to object to his impeaching his own witness, are you?

Mr. Baskin: Well, he seems like he is trying to.

Q. (By Mr. Stump): In the production of aggregate, Mr. Schaub, is it necessary to have much sand for road surfacing?

A. Not for road surfacing.

(Testimony of H. F. Schaub.)

Q. And in the road surfacing is it possible to operate a quarry and secure your material?

A. Well, normal procedure, which I think the engineer will bear with me, that they could make a superior product by crushing, crushing rock, especially for the surfacing material that is required on the road job rather than out of a pit with sand deposits.

Q. And in the operation of your business is it essential that you have a percentage of sand for making building blocks of concrete? [213]

A. Yes, sir; I have to have sand.

Q. About what percentage?

A. Well, I would say it should run forty per cent sand and sixty per cent aggregates; forty per cent fine aggregates, which is sand; sixty per cent coarse aggregates, which is gravel.

Q. Well, did you know of any other way in which to secure the aggregate to fulfill this present Manson-Osberg contract?

Mr. Baskin: Well, your Honor, now, he is asking a question as to where a contractor, who is not even a party to this suit, could get the material.

The Court: Yes. The question as to what somebody else could do is immaterial.

Q. (By Mr. Stump): Mr. Schaub, after your claim was staked, did the Government or the Forest Service tell you they were going to not let you have that claim at Whipple Creek?

A. That is right.

Q. Did you make the other staking referred to

(Testimony of H. F. Schaub.)
at Wards Cove, was that after the Government had told you they were going to kick you out of Whipple Creek? A. That is right.

Mr. Stump: That is all.

Recross-Examination

By Mr. Baskin:

Q. Mr. Schaub, the Government has never acknowledged your [214] claim there, have they? They have always denied it; isn't that right?

A. That is right.

Mr. Baskin: No further examination.

Mr. Stump: That is all, Mr. Schaub. Defendant rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Baskin: Just one moment. No, we have no rebuttal.

The Court: Well, I would prefer to have counsel submit briefs on the evidence and the law. How much time do you want?

Mr. Baskin: May the Government have at least ten days, your Honor? We have been so busy here.

The Court: You may have two weeks. How much time does the defense want for an answering brief?

Mr. Davidson: Two weeks.

The Court: Two weeks. And ten days for a reply if you feel a reply brief is necessary.

Mr. Baskin: Thank you.

(End of record.) [215]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove-entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz., The United States of America vs. H. F. Schaub, No. 3174-KA of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 215, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause, to the best of my ability.

Witness, my signature this 5th day of January, 1953.

/s/ MILDRED K. MAYNARD,
Reporter.

[Endorsed]: Filed January 5, 1953. [216]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Ketchikan, Alaska, this 9th day of January, 1953.

[Seal] J. W. LEIVERS,
Clerk of District Court.

By /s/ A. V. SIMONSEN,
Deputy Clerk.

[Endorsed]: No. 13685. United States Court of Appeals for the Ninth Circuit. H. F. Schaub, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, First Division.

Filed January 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 13685

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT H. F. SCHAUB'S STATEMENT OF POINTS ON APPEAL

I. The judgment in favor of the United States of America was in error for the following reasons:

1. Correction Memorandum No. 11 was not in the form of nor in purpose a special use permit under 48 U.S.C.A. §341 (62 Stat. 100) withdrawing the land covered thereby from mineral entry, nor was it issued by authorized officials under that statute, nor was it an appropriation of the land covered thereby authorized by or validly executed under 23 U.S.C.A. §18 (42 Stat. 216).

2. The order of the Secretary of the Interior withdrawing the land from mineral entry effective on July 26, 1951, did not relate back to prior administrative acts of the Regional Forester on February 9, 1951, so as to invalidate defendant's otherwise valid mineral entry on June 21, 1951.

3. No part of the premises embraced in defendant's mineral location was in actual use by or possession of plaintiff at the time of entry.

4. The United States District Court erred in excluding from evidence a certain letter dated February 7, 1951, by Frank Heintzleman to the Chief, U. S. Forest Service, Washington, D. C.; United States Department of Agriculture, Forest Service, Circular No. U-220, dated December 16, 1949; and Regulations U-1, U-2 and U-3, U. S. Forest Service Manual, pp. NF-G3 (1) to NF-G3 (5).

II. The United States District Court was in error in denying defendant's motion for a new trial and this court should order a new trial:

1. For the reasons specified in paragraph I hereof; and because

2. The United States District Court erred in denying defendant's motion for transmittal of copies of exhibits offered and refused as part of the record on appeal.

/s/ W. H. FERGUSON,

/s/ DONALD McL. DAVIDSON,

/s/ WILFRED C. STUMP,
Attorneys for Defendant.

Affidavit of mailing attached.

[Endorsed]: Filed January 19, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD

Comes Now appellant, H. F. Schaub, and designates the following portion of the record which is material to the consideration of the appeal:

The complete record of all of the proceedings in the above action heretofore filed in the office of the United States Court of Appeals for the Ninth Circuit, including the following:

Stenographic Transcript of Testimony at the trial; Complaint; Correction Memorandum No. 11; Answer; Defendant's Interrogatories; Plaintiff's Answers to Defendant's Interrogatories 1-17; Pre-Trial Orders; Plaintiff's Exhibit No. 1; Plaintiff's Exhibit No. 2; Defendant's Exhibit A; Opinion of Lyle Watts; Opinion of the District Court (Judge Folta); Motion for a New Trial; Findings of Fact and Conclusions of Law; Judgment; Bond for Costs; Notice of Appeal; Motion for Order Directing Transmittal of Exhibits Offered and Refused as Part of Record on Appeal; Affidavit in Support of Defendant's Motion for Transmittal of Copies of Exhibits Offered and Refused as Part of the Record on Appeal; Minute Orders.

/s/ W. H. FERGUSON,

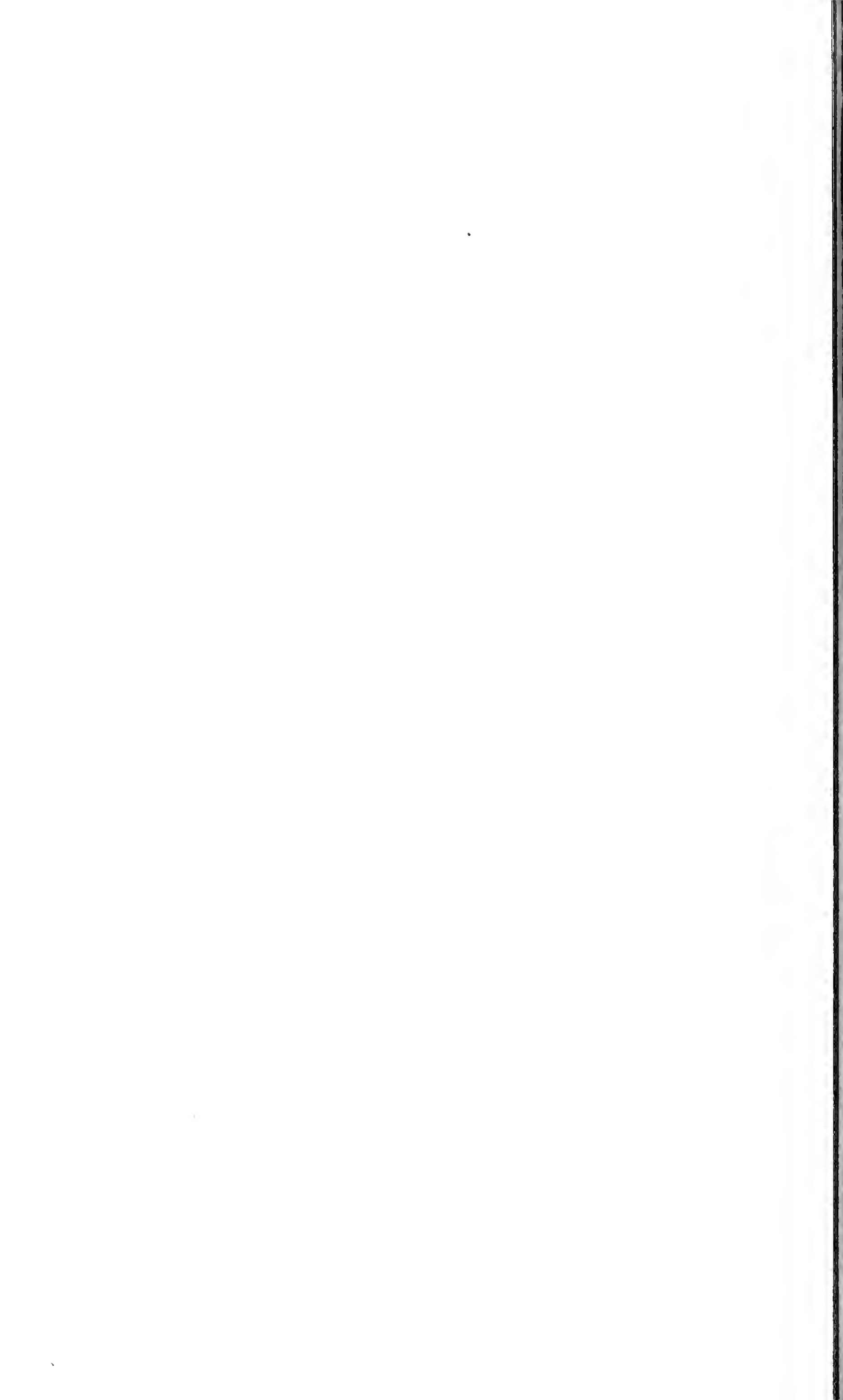
/s/ DONALD McL. DAVIDSON,

/s/ WILFRED C. STUMP,

Attorneys for Appellant.

Affidavit of mailing attached.

[Endorsed]: Filed January 19, 1953.



No. 13685

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

BRIEF OF APPELLANT

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FRAYN PRINTING COMPANY

FILED

APR 30 1953

PAUL P. O'BRIEN

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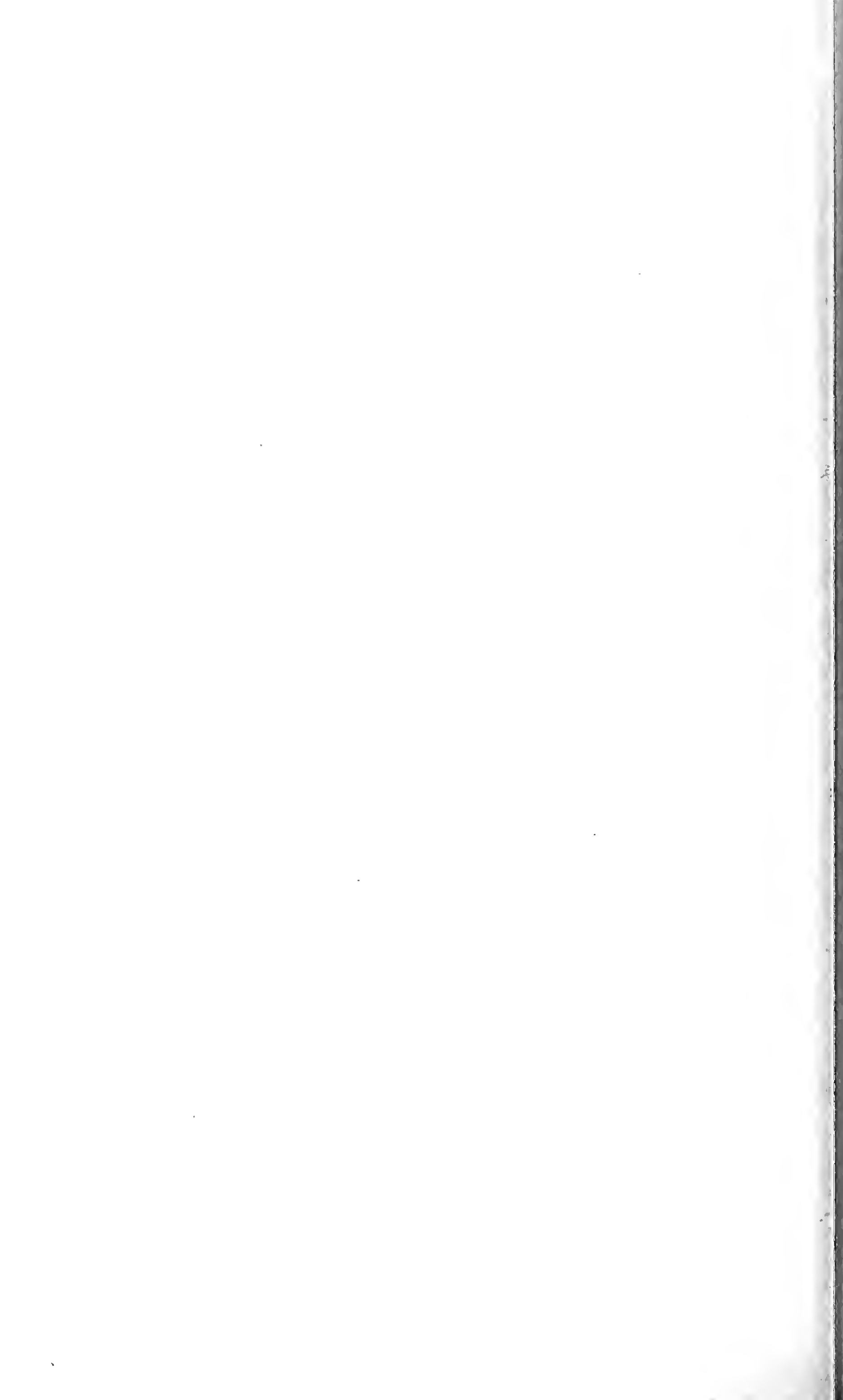

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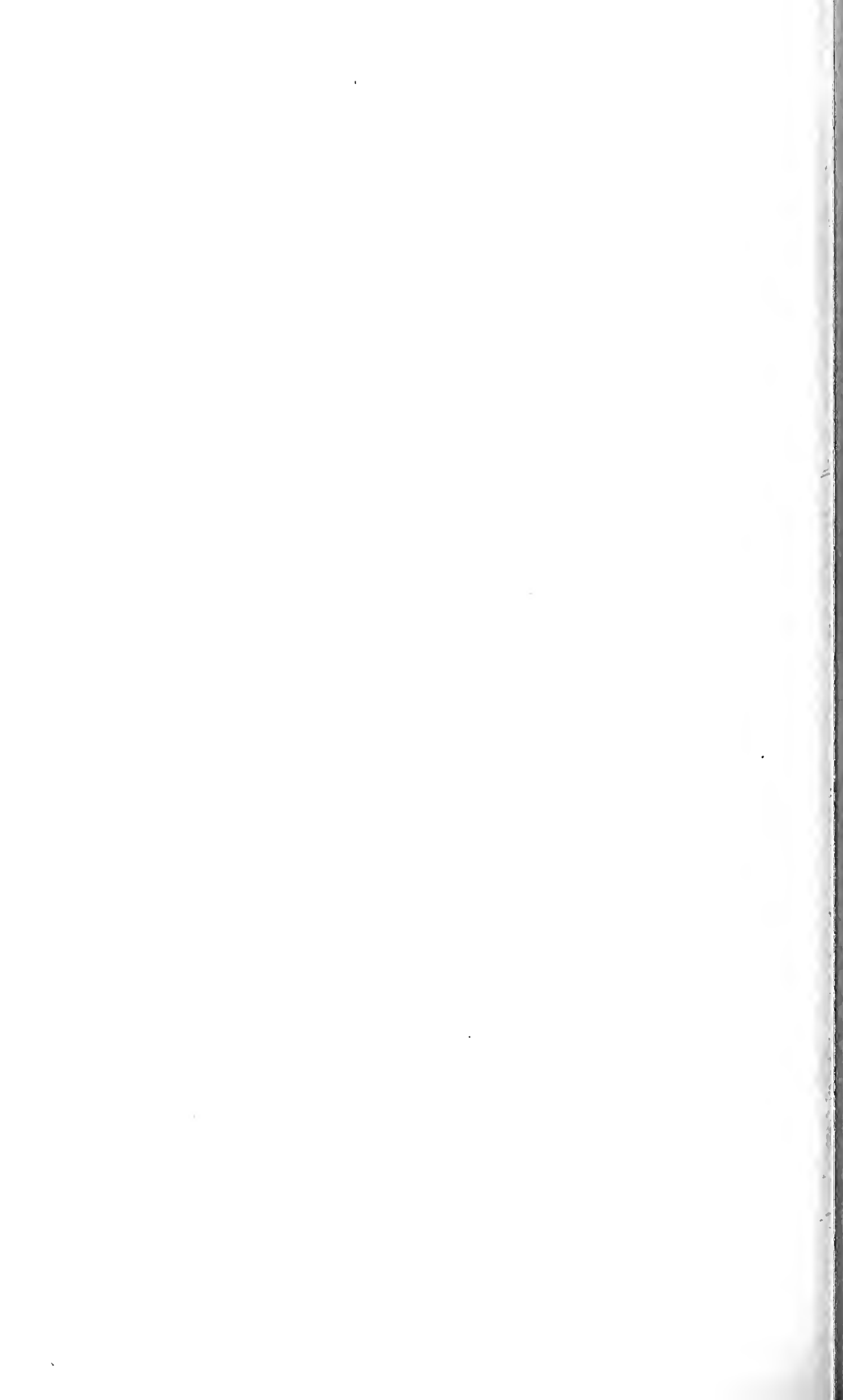
I. Public land order 734 was the final act appropriating the tract in question under well established law, but was not effective until July 26, 1951. It did not and could not relate back to prior administrative procedure leading up to its issuance so as to deprive appellant of a mineral claim located upon unappropriated public land two months earlier. Forest service regulations and the order itself expressly state that such an order could not affect appellant's vested rights ... 16

II. a. Correction Memorandum No. 11 was not a special Use Permit under 48 U.S.C. § 341 (62 Stat. 100) ... 25

1. The lower court recognized it was not a permit by applying the fiction of "relation back" ... 26



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2. The application for Public Land Order 734 and the Order itself are inconsistent with the theory of a permit 26

3. No permit can be issued for development of mineral resources subject to mineral entry or the mineral leasing laws 29

4. Correction Memorandum No. 11 was not issued to anyone, nor was it in form a permit 32

5. Plaintiff did not rely upon Correction Memorandum No. 11 being a permit under 48 U.S.C. § 341 prior to or during the trial 35

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IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 13685

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

BRIEF OF APPELLANT

ISSUES INVOLVED

The lower court ruled defendant's mining claim invalid in so far as it overlapped a 37.5 acre tract that was withdrawn from mineral entry by public land order some two months later, and enjoined defendant from using or developing his claim. Two primary questions are raised by defendane's appeal:

1. Did Public Land Order 734 of the Secretary of the Interior, published July 26, 1951, relate back to February 9, 1951 so as to appropriate the land as of that date and invalidate defendant's mineral

entry on June 21, 1951 on what was then unappropriated mineral land, when Forest Service regulations state that such order is not effective until it is published and the order itself was subject to existing rights?

2. Was a document entitled "Correction Memorandum No. 11" signed by the Chief Forester in connection with and as part of the administrative procedure leading up to Public Land Order 734 a permit under a statute which neither plaintiff nor defendant relied upon or mentioned at the trial and which is inconsistent with a withdrawal by public land order, when the memorandum was not in the form of a permit nor referred to as a permit nor issued to anyone?

STATEMENT OF THE PLEADINGS

Plaintiff, the United States of America, instituted this action by a complaint seeking a temporary and permanent injunction restraining the defendant, H. F. Schaub, from using occupying or interfering with a certain 37.5 acre tract of land near Ketchikan, Revillagigedo Island, Alaska, and a determination that defendant's claim of right, title and interest in such tract was invalid (Tr. 10). The tract involved lies along Whipple Creek and will sometimes be so described herein.

Paragraph III of the complaint described the tract by metes and bounds and alleged it to be

part of the Tongass National Forest (Tr. 3-4). Defendant denied that plaintiff owned all of such land (Tr. 28).

Paragraph IV of the complaint alleged that the 37.5 acre tract was part of a public service site set apart and appropriated by the Regional Forester of the U. S. Forest Service on September 3, 1940, by various acts pursuant to specified regulations (Tr. 4). Defendant denied that such acts of the Forester appropriated the tract (Tr. 28).

Paragraph V of the complaint alleged that the 37.5 acre tract was set apart, appropriated and reserved for the use of the Bureau of Public Roads by the Regional Forester on February 9, 1951 (Tr. 4-5). Defendant admitted issuance of "Correction Memorandum No. 11" but denied that any authority existed for its issuance (Tr. 28).

Paragraph VI of the complaint alleged that the Secretary of the Interior by Public Land Order 734, dated July 20, 1951 and published July 26, 1951, in 16 Fed. Reg. 7329, withdrew the land from mineral entry (Tr. 5). Defendant admitted issuance of the order, but alleged that the withdrawal was not effective until July 26, 1951, and was "subject to valid existing rights" (Tr. 28).

Paragraph VII of the complaint alleged that the Forest Service and Bureau of Public Roads had appropriated the 37.5 acre tract by prospecting, searching for, surveying, finding, discovering,

mining and removing large quantities of sand and gravel between 1934 and 1951 (Tr. 5-6). Defendant admitted that gravel had been removed intermittently by private contractors from the creek bed running through the tract (Tr. 28).

Paragraph VIII of the complaint alleged that defendant went upon the 37.5 acre tract on or about June 21, 1951 and unlawfully posted a notice of claim, barred others from entry, moved improvements thereon and removed timber, overburden, sand, gravel and stone (Tr. 6). Defendant denied these allegations except admitting that he made a valid mineral entry upon a portion of the 37.5 acre tract on June 21, 1951 (Tr. 28).

Paragraphs IX, X and XII of the complaint alleged that defendant prevented plaintiff from using the 37.5 acre tract and had removed timber, overburden, stone and gravel, that defendant's acts constituted interference with the United States in its administration of the Tongass National Forest and that an injunction was necessary to restrain the defendant from such acts (Tr. 7-9). Defendant admitted these allegations (except as to removal of timber, overburden, sand and gravel); but alleged that all of such acts were upon land which he had made a valid mineral entry (Tr. 28-29).

Paragraph XI of the complaint alleged that plaintiff had made a valid contract for the construction of the North Tongass Highway, Revil-

lagigedo Island, Alaska, which provided that borrow material could be obtained from the 37.5 acre tract (Tr. 8). Defendant admitted these allegations, but alleged that such contract was made by plaintiff with full knowledge that defendant had made a mineral entry upon a portion of such 37.5 acre tract and was in actual possession thereof (Tr. 29).

Defendant alleged as affirmative defenses:

1. That there is no legal authority for the Regional Forester or employee of the Department of Agriculture or of the Bureau of Public Roads or Department of Commerce to designate land within a National Forest for mineral development or use so as to exclude mineral entry (Tr. 29-30).

2. That the only use of the land had been removal by private contractors of sand and gravel partly in areas not claimed by defendant; that the land was subject to mineral entry on June 21, 1951, and that the Forest Service has no right to appropriate or withdraw mineral lands within a National Forest (Tr. 30).

3. That defendant made and duly perfected a valid mineral entry June 21, 1951 on property described by metes and bounds, a portion of which was within the 37.5 acre tract, prior to the time any part of the 37.5 acre tract was withdrawn from mineral entry (Tr. 31).

Defendant submitted written interrogatories

prior to answering, paragraph 5 of which requested as follows:

> "5. Please specify and identify under which law of the United States or Departmental regulation by which the Regional Forester of the U. S. Forest Service at Juneau, Alaska, on February 9, 1951 made the appropriation claimed in paragraph 5 of the complaint." (Tr. 19)

The answer of the plaintiff to this interrogatory was as follows:

> "Answer: Act of Congress dated June 4, 1897, 30 Stat. 35. Act of Congress dated February 1, 1905, 33 Stat. 628." (Tr. 23)

The relevant portion of the first of these acts is now codified at 16 U.S.C. § 477, and provides:

> "The Secretary of Agriculture may permit, under regulations to be prescribed by him, the use of timber and stone found upon national forests, free of charge, by bona fide settlers, miners, residents and prospectors for minerals, for firewood, fencing, building, mining, prospecting and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such national forests may be located."

The second statute referred to in the answer to the interrogatory now appears at 16 U.S.C. § 472 (33 Stat. 628), which provides as follows:

> "The Secretary of the Department of Agriculture shall execute or cause to be executed all laws affecting public lands reserved under the provisions of section 471 of this title, or sec-

tions supplemental to and amendatory thereof, subject to the provisions for national forests established under subdivision (b) of section 471 of this title, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands. Feb. 1, 1905, c. 288, § 1, 33 Stat. 628."

In response to other interrogatories regarding the statutory authority for the various acts of the U. S. Forest Service and Bureau of Public Roads claimed to be an appropriation, the plaintiff several times repeated the same statutes (Interrogatory 2 and 8; Tr. 22 and 24) and added a third, the Federal Highway Act, 42 Stat. 221, as amended, 23 U.S.C. § 1, et seq. (42 Stat. 212). (Interrogatory 8; Tr. 24). Section 18 of that act provides:

"If the Secretary of Agriculture determines that any part of the public lands or reservations of the United States is reasonably necessary for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations, the Secretary of Agriculture shall file with the Secretary of the department supervising the administration of such land or reservation a map showing the portion of such lands or reservations which it is desired to appropriate.

"If within a period of four months after such filing the said Secretary shall not have certified to the Secretary of Agriculture that the proposed appropriation of such land or material is contrary to the public interest or incon-

sistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department for such purposes and subject to the conditions so specified.

"If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Agriculture, and such lands or materials shall immediately revert to the control of the Secretary of the department from which they have been appropriated."

a. *Jurisdiction of the District Court*

The District Court for the Territory of Alaska had jurisdiction of the action under the provisions of 48 U.S.C. § 101, 31 Stat. 322 as amended, and 28 U.S.C. § 1344, 62 Stat. 933.

b. *Jurisdiction of this Court*

This Court has jurisdiction of the appeal under the provision of 28 U.S.C. § 1291, 62 Stat. 929 and 28 U.S.C. § 1294 (2), 62 Stat. 930.

STATEMENT OF THE CASE

a. *Defendant's Mining Location*

Defendant H. F. Schaub commenced operation of a sand, gravel and prefabricated concrete products plant in Ketchikan, in April 1950 (Tr. 290). He has been in the sand and gravel business since 1940 (Tr.

289). His gravel supply at Ketchikan was under tidelands which he subleased from Alaska Concrete Products Corporation, subject to the right of an adjacent property owner to erect a pier. Erection of the pier would have put the defendant out of business (Tr. 291-292). Defendant invested $10,000 in a concrete block plant, but it was "practically idle" because the sand and gravel was stained and concrete block made from it was unmarketable (Tr. 293, 307). At the time of trial defendant had been stopped from operating with the beach gravel by the Bureau of Land Management which claimed ownership of the sand and gravel and notified defendant that he was trespassing (Tr. 292).

In June 1951 defendant and a witness went to a point in Whipple Creek about fifteen hundred feet from the road so as not to interfere with possible road construction and made his discovery location on an ample deposit of gravel (Tr. 298). The discovery point was not within the 37.5 acre tract (Tr. 157-518), but most of the claim fell within the area later withdrawn by public land order. Two days later, on June 21, 1951, defendant returned and placed corner stakes and brushed out the lines (Tr. 299-300). After completing the boundary lines and corner statues and posting notice of the claim, defendant filed a notice of location in the Recorder's Office on June 27, 1951 (Tr. 300, Def. Ex. A). Defendant located the claim openly and peaceably

(Finding of Fact IV, Tr. 59). The gravel at this location was tested by a laboratory in Seattle and it meets standard specifications and will make a good concrete block (Tr. 292-293).

The defendant owns a gravel mining claim at Boca de Quadra on Martin Arm (Tr. 304). Gravel from that claim is of satisfactory quality (Tr. 307), but cannot be used at Ketchikan because the cost of transportation is prohibitive (Tr. 311). The defendant knew in 1940 (Tr. 296) that there was a gravel deposit on the tract, but was not then engaged in the gravel business at Ketchikan. Large quantities of gravel have always been exposed over its entire length (Tr. 302, 219).

b. *Correction Memorandum No.* 11

A plat of the 37.5 acre tract was forwarded to the Forest Service on January 31, 1951 by the Bureau of Public Roads with the "request that it be set aside formally for gravel purposes." (Tr. 137, 253). The Bureau of Public Roads had prepared the plat of the 37.5 acre tract by projecting lines from existing surveys and calculating the outside boundaries (Tr. 246, 268). No boundaries were ever marked or surveyed on the ground nor were the corners staked (Tr. 246, 268).

As a result the Regional Forester signed a document entitled "Correction Memorandum No. 11" at Juneau about February 7, 1951, which was placed

in the land records of the Southern Division of the Tongass National Forest two days later on February 9, 1951 (Tr. 182-183). That document described the 37.5 acre tract by metes and bounds in accordance with the plat and stated that the tract was "hereby reserved for the use of the Bureau of Public Roads as a source of road building material" (Tr. 11). Simultaneously and as a part of the same transaction as the issuance of the Correction Memorandum (Tr. 182), the Regional Forester sent a letter dated February 7, 1951 to the Chief of the U. S. Forest Service, enclosing a form letter to the Director of the Bureau of Land Management from the Chief of the U. S. Forest Service (Tr. 181-183, 273-274). This letter was part of the Forest Service custom and procedure to obtain formal withdrawal by the Secretary of the Interior (Tr. 271). The enclosed letter from the Chief of the Forest Service was forwarded to the Bureau of Land Management between February 13 and March 8, 1951 (Tr. 276) and requested that

> "The land shall be subject to leasing under the mineral leasing laws for their oil and gas deposits provided no part of the surface of the land shall be used in connection with prospecting, mining and removal of the oil and gas." (Tr. 76, 273-274)

The description of the tract to be withdrawn as contained in that letter (Tr. 77) is slightly different than that contained in Correction Memorandum No.

11 (Tr. 11), the first and last courses of the former having been changed so as to enclose a smaller area, and erroneously designating the fourth course as S. 46″ 30′ E. instead of S. 46″ 30′ W.

These preliminary steps did not result in any withdrawal until July 20, 1951 when the Secretary of the Interior signed an order declaring that the tract

> "Subject to valid existing right . . . is hereby withdrawn from all forms of appropriation under the public land laws, including the mining laws but not the mineral leasing laws . . ." (Public Land Order 734, p 48, infra)

The order was published in the Federal Register on July 26, 1951 and became effective on that date.

The Secretary of the Interior withdrew the tract under a different description than that contained in either Correction Memorandum No. 11 or the formal request for withdrawal by the Chief of the U. S. Forest Service, being smaller in area than the former and correcting errors in the latter. The order ignored the request that the land be withdrawn from the operation of the mineral leasing laws except to a limited extent and left the tract subject to the full operation of such laws (See p 48, infra).

Defendant offered the letters to show that Correction Memorandum No. 11 was only an administrative step leading to a withdrawal by Public Land Order, and that the Secretary of the Interior exer-

cised his own independent judgment in making that withdrawal.

c. *Use and Possession Claimed by Plaintiff as a Withdrawal*

During 1942 the U. S. Coast Guard removed three or four hundred yards of gravel from the Whipple Creek area with the consent of the Forest Service for road purposes (Tr. 128, 129). During 1948-1949 Berg Construction Company removed 15,369 yards of borrow fill and surfacing (Tr. 131). Another contractor removed 6,654 yards in 1949 (Tr. 135). Mr. Berg, under another contract, removed 8,215 yards starting June 28, 1950 and continuing into December 1950 (Tr. 135). All of these contractors were constructing Forest Service roads under contract with the Forest Service.

These contractors bulldozed (Tr. 202) a roadway approximately 1000 feet long (Tr. 146). The supervisor of the Southern Division of the Tongass National Forest, Mr. Archibold, (Tr. 123) testified that

> ". . . it was a very simple operation to make a road with a bulldozer that a truck could go on. All they would have to do is level off the ground. It was all hard gravel so it was no problem at all. You can go any place on that north side of the stream with a very small amount of work to make a good road even after the stream has had its high-water stages." (Tr. 202)

The contract required the contractor to construct the road "without remuneration for such things as his needs require." (Tr. 161).

A contractor built a log loading ramp in 1949 (Tr. 146, 207). Mr. Archibold testified that the ramp was left there for the use of the Forest Service and the Bureau of Public Roads at the request of the Forest Service (Tr. 147), but admitted that the Forest Service did not maintain it, and that he did not know that anyone ever used it after the contractor left (Tr. 208).

There was no evidence that anyone used the tract after the conclusion of the last Berg contract in December of 1950 (Tr. 135) and before June 21, 1951, the date defendant made his mineral entry (Tr. 299-300).

Mr. Archibold testified that the "developed" areas resulting from these operations included the stream bed as it fluctuated back and forth (Tr. 176). The contractors had worked mainly in the bed of the stream. Gravel washed down the hill and filled up the pits as they were dug (Tr. 155).

d. *Judgment of the Lower Court*

The judgment of the lower court permanently enjoined defendant from barricading plaintiff's right of way to the 37.5 acre tract described by Correction Memorandum No. 11 and from using or occupying such land or mining and removing sand

and gravel from the tract and required defendant to remove any barricade he had placed upon the tract and other property and equipment belonging to him. The judgment recited that defendant's mining claim "be and is hereby declared null and void insofar as his claim of right, title and interest therein embraces or constitutes a part of the said 37.5 acres of land." (Tr. 66-68).

Judgment was entered on May 17, 1952. Defendant moved for judgment notwithstanding the decision of the court and for a new trial (Tr. 54), both of which motions were denied on July 2, 1952 (Tr. 17-18). This appeal followed.

SPECIFICATIONS OF ERROR

The District Court erred as follows:

1. Including in Finding of Fact VI the statement that the Regional Forester "issued to the Bureau of Public Roads Correction Memorandum No. 11" (Tr. 60).

2. In making Findings of Fact V, VII and VIII (Tr. 61).

3. In making Conclusions of Law I, II, III, IV, V VI (Tr. 63-64).

4. In entering judgment in favor of plaintiff.

5. In excluding from evidence the following:

(a) letter dated February 7, 1951 by Frank Heintzelman to the Chief, U. S. Forest Service,

Washington, D. C., and enclosure. (Identified, Tr. 181, 273-274; Offered, Tr. 275; Refused, Tr. 277);
(b) U. S. Forest Service Regulation U-3 (Identified, Tr. 193; Offered, Tr. 195, 278; Refused Tr. 197, 278);
(c) Circular No. U-220, U. S. Department of Agriculture, dated December 16, 1949 (Identified, Tr. 197; Offered, Tr. 197, 278; Refused Tr. 197, 278).

6. In denying defendant's motion for a new trial.

ARGUMENT

I. *Public Land Order* 734 *was the final act appropriating the tract in question under well established law, but was not effective until July* 26, 1951. *It did not and could not relate back to prior administrative procedure leading up to its issuance so as to deprive appellant of a mineral claim located upon unappropriated public land two months earlier. Forest Service regulations and the order itself expressly state that such an order could not affect appellant's vested rights.*

The lower court erred in conclusion of Law IV in holding that Public Land Order 734 "related back" to the "formal written request for withdrawal by the Forest Service." (Tr. 64)

Article IV, § 3, cl. 2 of the Constitution provides:

> "The Congress shall have power to dispose of and made all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; * * *"

It has been uniformly held that the power of Congress is exclusive, and that neither the courts, the

States, nor executive agencies may proceed contrary to or in excess of authority of Act of Congress. *U. S. v. Fitzgerald,* 15 Pet. 407; *U. S. v. Gratiot,* 14 Pet. 537; *U. S. v. State of California,* 332 U. S. 19, 67 S.Ct. 1658 (1947).

In *U. S. v. Fitzgerald,* 15 Pet. 407, 421 (1841), the Supreme Court first held that acceptance of a Congressional grant by a qualified settler was effective notwithstanding various executive acts claimed to constitute a withdrawal. The rule has been unquestioned in subsequent cases for the last 112 years, and is illustrative of the strictness with which the courts will scrutinize claims that defeat the acquisition of rights in public lands under authority of Congress.

In the *Fitzgerald* case, the United States brought an action to recover 160 acres of land claimed under the pre-emption laws by the defendant. The defendant had been appointed an Inspector of Customs in 1833 and had been put into possession of the tract in question by the Collector of Customs. The house and grounds had been occupied by former government officers exercising the same functions as defendant. The defendant was not required to live at that spot, nor was the government required to furnish him any accommodations. The defendant applied for the purchase of the land on the last effective day of the law, but patent was refused because the Secretary of the Treasury di-

rected that it be reserved from sale for use by the custom house (for which purpose it had been used for many years prior to the defendant's settlement upon it). Congress had appropriated funds for the purpose of building a lighthouse in the area in 1831. It was claimed that the tract in question was the only spot where one could be put. Despite the denial of his entry, defendant remained in possession of the tract "which had become valuable for the lighthouse being erected upon it."

The Supreme Court affirmed a decree quieting title in the defendant, saying:

> "It cannot be pretended that the land in controversy was reserved from sale by an act of Congress or by order of the President, unless the direction of the Secretary of the Treasury, to reserve it from sale several months after it had been actually sold and paid for, could amount to such an order. As no reservation or appropriation of the land made after the right of the defendants accrued under the Act of the 19th of June, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation.
>
> ". . . No appropriation of public land can be made for any purpose but by authority of Congress. By the third section of the fourth article of the Constitution of the United States, power is given to Congress to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States. As no such authority has been shown to authorize the collector at New Orleans to appropriate this land to any use whatever, it is wholly useless to inquire whether his

acts, if they had been authorized by law, would have amounted to an appropriation.

"* * * If the act had directed that the light-house should be built on this particular tract according to the decision of this court in the case of Wilcox v. Jackson (13 Peters 498), it would have been such an appropriation within the meaning of the Act of the 29th of May, 1830, as would have deprived the defendants of their right of pre-emption. But the same plat shows that the light-house was built on Wagner's Island, which appears to be at the mouth of the southwest pass, and not included with this or either of the other tracts of land exhibited on the plat. From this examination of the case, it is clear that the land in controversy was neither reserved from sale nor appropriated to any purpose whatever."

United States v. Tichenor, 12 Fed. 415 held that a memorandum by the President was only a precautionary note and was not a withdrawal where there was no specific description or designation of a particular area in the public land records. It also held that occupation of a particular tract of public land as a military tract did not withdraw the land from operation of the public land laws.

United States v McGraw, 12 Fed. 449 (1882) held that an order of the Secretary of War purporting to make a military post "permanent according to previous action" was void insofar as it affected lands previously entered.

Northern Pac. Ry. Co. v Mitchell, 208 Fed. 469 held that neither a recommendation that land be withdrawn for an Indian Reservation by an in-

spector of the Indian Department, nor an order by the Commanding General of the Indian Department nor recommendations for withdrawal by the Secretary of the Interior to Congress withdrew the land. It was also held beyond the power of the President to withdraw the land so as to affect rights acquired several months earlier by a railroad.

Presidential power to withdraw lands from the disposal contemplated by Congress under the mineral laws or other public land laws was unquestioned, until 1910, when vast tracts of oil lands were withdrawn from mineral entry. Shortly afterwards and as a result of the controversy that ensued, Congress granted limited powers to the President to withdraw lands from entry under the public land laws and required that annual reports of such withdrawals be submitted to it. 43 U.S.C. § 141 et seq., 36 Stat. 847. (See *United States v. Midwest Oil Co.*, 236 U.S. 459, 35 S.Ct. 309)

The acting solicitor of the Department of the Interior in an opinion entitled *Authority of the Secretary of the Interior to Withdraw Public Lands,* 57 L.D. 331 suggested in 1941 that the president delegate his statutory and implied authority to withdraw land to the Secretary of the Interior.

Executive Order 9337, effective April 26, 1943 (p 49, infra) was thereupon issued delegating to the Secretary of the Interior the President's statutory

and implied authority, if any, to appropriate or withdraw public land.

Pursuant to Executive Order 9337, Public Land Order No. 734, relied upon by plaintiff in the case at bar, was published July 26, 1951 in the Federal Register. That order withdrew the 37.5 acre tract "from all forms of appropriation under the public land laws, including the mining laws, *but not the mineral leasing laws*" (italics added). The withdrawal order by its terms was "subject to valid existing rights."

Public Land Order 734 was a result of a "formal request in writing" by the Regional Forester made on February 7, 1951 simultaneously with his issuance of Correction Memorandum No. 11 and as part of the same transaction in accordance with the custom and procedure of the Forest Service (Tr. 182, 271). Such a request for a withdrawal does not in itself withdraw the land under Forest Service Regulations U-3 and Circular Letter U-220.

Regulation U-3 (Tr. 92) described the administrative steps leading up to a withdrawal by public land order and states that such an order is "not effective until published in the Federal Register.", i.e. two months after defendant's mineral entry in the case at bar.

Circular Letter U-220 (Tr. 78-79) is a procedural regulation which itself recognized that a formal order under Executive Order 9337 is necessary to

withdraw an undeveloped area such as the 37.5 acre tract here in question:

> "The Solicitor of this Department believes that developed administrative sites and public service areas are protected against location and entry under the U. S. Mining Laws but is very doubtful whether buffer zones around such areas or potential but undeveloped areas are protected. The Bureau of Land Management has some doubts as to whether even a developed area can be protected from mining claims unless withdrawn under Executive Order No. 9337 or by legislation." (Tr. 78)

Appellant conceded that the formal order of withdrawal, Public Land Order No. 734, was authorized, lawful and effective on July 26, 1951. But appellant maintained that the procedure adopted by the Forest Service could not affect his rights, nor could the order itself relate back to invalidate his mineral entry of June 21, 1951. On that date appellant acquired a vested property interest in the lands under the mineral laws which could not be destroyed by executive action.

A mineral location on unappropriated public land gives the locator a property right. Thus, in *Belk v. Meagher,* 104 U. S. 279 (1881), the court said (at page 283):

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent."

In *Gwillim v. Donnellan*, 115 U.S. 45, 49, the court held:

> "A valid location of mineral lands, made and kept in accordance with statute, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

As pointed out in *Van Ness v. Rooney*, 160 Cal. 131, 116 Pac. 392, error dismissed 231 U.S. 737, 34 S.Ct. 316:

> "The moment the locator discovered a valuable mineral deposit on the lands and perfected his location in accordance with law, the power of the United States government to deprive him of the exclusive right to the possession of the located claim was gone * * *."

As early as 1881 the Attorney General of the United States had ruled that there could be no relation back of an admittedly valid presidential withdrawal so as to restrict the possessary rights of miners or to prevent such miners acquiring patents where their claims were located "several months previous" to establishment of a military post. 17 Op. Atty. Gen. 230 (1881) entitled "Reservation of Land for Public Purposes," states in part:

> "Under the laws providing for the exploration, occupation and disposal of mineral lands, the locator, so long as he complies with the conditions imposed by those laws, is clothed with a possessary right, which entitled him to the exclusive right of possession and enjoyment of

all the surface included within the lines of his location.

* * *

"* * * The rights thus recognized by Congress are property of great value. Very large amounts are invested in mines, the ownership of which rests solely upon the possessary right referred to.

"It seems to me that where such right has attached to mineral land in favor of the locator of a mining claim, the land during the continuance of the claim (i.e., so long as it is maintained in accordance with law) becomes by force of the mining laws appropriated to a specific purpose, namely, the development and working of the mine located; and, unless Congress otherwise provides, it can not, while that right exists, notwithstanding the title thereto remains in the Government, be set apart by the Executive for public uses.

Similarly, in *United States v. Fitzgerald* (supra, p 18) the court said:

"As no reservation or appropriation of the land made after the right of the defendants accrued under the Act of the 19th of June, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation."

And in *United States v. McGraw* (12 Fed. 449), the court held that an order making a military post "permanent according to previous action" could not affect defendant's rights "because they were purchased [entered] before the order was made." Again in *Northern Pac. Ry. Co. v. Mitchell* (208 Fed. 469)

a presidential order of withdrawal did not divest any title because "it was without the power of the President to divest that title or affect the status of the land in any way." In *United States v. Tichenor,* 12 Fed. 415) a withdrawal did not relate back to a preliminary notation by the President himself. See also *Nygard v. Dickinson,* 97 F. (2d) 53 (C.C.A. 9th); *U. S. v. Deasy,* 24 F. (2d) 108 (D.C. Idaho); *Van Ness v. Rooney,* 160 Cal. 131, 116 Pac. 392, error dismissed, 231 U.S. 737, 34 S.Ct. 316.

These rules are particularly applicable to the case at bar since Regulation U-3 itself states that Public Land Order 734 was not effective until published on July 26, 1951, two months after defendant's mineral entry, and the order itself was "subject to valid existing rights."

A mineral location could not be sold, improved or developed upon what appears to be a good title if the law permits an executive withdrawal to relate back to some prior administrative act by a subordinate official.

II.

a. *Correction Memorandum No.* 11 *was not a special use permit under* 48 *U.S.C.* § 341 (62 *Stat.* 100).

The second ground for the lower court's decision was that "Correction Memorandum No. 11" was a permit which itself withdraw the land from mineral entry prior to defendant's location.

1. *The lower court recognized it was not a permit by applying the fiction of "relation back."*

The lower court implicitly recognized the fact that Correction Memorandum No. 11 was but a step leading up to the withdrawal of the 37.5 acre tract by Public Land Order 734 of the Secretary of the Interior by its Conclusion of Law IV (Tr. 64). The Court there held that the latter withdrawal "related back to said formal written request for withdrawal" (Tr. 75-77). This formal written request for withdrawal was concededly part of the same transaction as the issuance of Correction Memorandum No. 11 in accordance with Forest Service custom and procedure (Tr. 182, 271).

The lower court's conclusion of law thus points out the fact that Correction Memorandum No. 11 was not in itself a permit withdrawing the land from mineral entry. If it was, then no further action was necessary, nor was there any need to apply the legal fiction of "relation back."

2. *The application for Public Land Order* 734 *and the order itself are inconsistent with the theory of a permit.*

48 U.S.C. § 341 (62 Stat. 100) provides that, after issuance of a permit

> "the land therein described shall not be subject to location, entry or appropriation, under the public land laws or mining laws, *or to disposition under the mineral leasing laws.*" (italics added)

Despite this, the formal written request for withdrawal made as part of the same transaction as issuance of Correction Memorandum No. 11 requested that

> "The said lands shall be subject to leasing under the mineral leasing laws for their oil and gas deposits, provided that no part of the surface of the lands shall be used in connection with prospecting, mining and removal of oil and gas." (Tr. 76)

The Secretary of the Interior made no such reservation. Public Land Order 734 (p 48, infra) withdrew the lands

> "from all forms of appropriation under the public land laws, including the mining laws *but not the mineral leasing laws,* * * *" (italics added)

This order, incidentally, shows that the Secretary of the Interior exercised independent judgment as to the terms of the withdrawal and as to its extent, and hence confirms the view that such orders do not relate back to an earlier and different administrative request. It is even more important, however, to show that Correction Memorandum No. 11 was not a permit under 48 U.S.C. § 341 (62 Stat. 100). If the memorandum had been a permit under such statute there would have been no occasion for the Forest Service to request its withdrawal from even a limited operation of the Mineral Leasing Act, nor could the Secretary of the Interior modify that

request so as to leave the land subject to the full operation of that law.

Under the mineral leasing law the Secretary of Agriculture has no power to lease mineral lands in National Forests or dispose of such lands by permit, Opinion 5081 of the Solicitor of the Department of Agriculture, December 7, 1944 (quoted in full Tr. 33-46). The committee report on 16 U.S.C. § 508 (64 Stat. 311) reported in 2 U.S. Code Cong. Serv., 1950, p. 2622, refers to the opinion as the basis for passing a special statute permitting the development of gravel deposits in the Chippewa National Forest under lease by the Secretary of the Interior.

If the land is subject to the Mineral Leasing Laws, however, defendant might salvage part of his $10,000 investment in his concrete block plant (Tr. 292) by obtaining a lease of the sand and gravel deposits—even if his mining claim should be set aside. It appears that there is no other concrete plant in Ketchikan (Tr. 290) and the defendant has no source of supply for his present plant (Tr. 292). Unless defendant's mining claim is allowed, or the Secretary of the Interior has power to lease the Whipple Creek sand and gravel deposit on terms sufficient to interest a private investor, there is no way in which Ketchikan can obtain its usual requirements of concrete products at reasonable cost. If Correction Memorandum No. 11 is a

permit under 48 U.S.C. § 341 (62 Stat. 100) then neither defendant nor the Town of Ketchikan may look to Whipple Creek for future needs.

3. *No permit can be issued for development of mineral resources subject to mineral entry or the mineral leasing laws.*

Correction Memorandum No. 11, as shown by the evidence, was for the purpose of allowing the Forest Service and the Bureau of Public Roads supervising or themselves extracting, processing and using sand and gravel (Tr. 228-230) — in short, to develop the 37.5 acre tract as a mine. It is clear that the Secretary of Agriculture had no such power prior to enactment of 48 U.S.C. § 341 (62 Stat. 100) and equally clear that the statute did not change the long existing rule to that effect. Of course, the Secretary of Agriculture may administratively permit the use of resources in National Forests. He even has the power to suffer trespasses. The exercise of such power does not foreclose mineral entry upon the lands, however.

The Act of June 4, 1897 (16 U.S.C. § 482, 30 Stat. 11) establishing National Forests under the jurisdiction of the Secretary of the Interior provided that:

> "any minerals in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall

> continue to be subject to such location and entry, nothwithstanding any provisions herein contained."

When in 1905 the management of the forest reserves was transferred from the Secretary of the Interior to the Secretary of Agriculture by Act of February 1, 1905 (16 U.S.C. § 472, 33 Stat. 628), Congress expressly retained in the Secretary of the Interior all laws affecting:

> "*The surveying, prospecting, locating, appropriating,* entering, relinquishing, reconveying, certifying, or patenting of any of such lands." (Italics added.)

Under these statutes, regulations of the Secretary of Interior have provided for over fifty years that National Forest lands are open to location in the usual manner. 31 L.D. 453, 493 (1901), 43 C.F.R. 185.33.

So stringent has the rule been that the Secretary of Agriculture has no power to classify forest land for public use and convenience or to issue permits so as to bar mineral entry that at least nine separate statutes have been passed limiting the surface use of mining claims or preventing the location of mining claims in specific areas of National Forests:

> (47 State. 771) 16 U.S.C. § 482 a; (48 Stat. 773) 16 U.S.C. § 482 b-d; (53 Stat. 817) 16 U.S.C. § 482 e-g; (54 Stat. 52) 16 U.S.C. § 482 h; (60 Stat. 254) 16 U.S.C. § 482 h(1)-(3); (56

> Stat. 311) 16 U.S.C. § 482 i; (63 Stat. 168) 16 U.S.C. § 482 j-1; (63 Stat. 75) 16 U.S.C. § 482 n; and (65 Stat. 118) 16 U.S.C. § o-q.

Most of these statutes covered roadside areas and their purpose as shown by committee reports was to prevent the surface use of mineral locations which might interfere with scenic beauties and public recreation along highways.

The Solicitor of the Department of Agriculture in 1944 pointed out in an opinion to the Chief of the Forest Service (Opinion No. 5081) (Tr. 33, 39-40):

> "It is apparent from a review of the objects of the national forests that they can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of the mineral resources. Ops. Sol. 264 and 1866 (O.S.). Development of mineral resources may be of benefit to the United States. However, the question is one of power, and that must come from Congress and is not to be inferred from the fact that the proposed action would be highly beneficial to the United States. 20 Ops. Att'y Gen. 93 (1891)."

See also *United States v. Nebo Oil Co.,* 90 F. Supp. 73 (D.C. La.)

The purpose of 48 U.S.C. § 341 (62 Stat. 100) was "specifically to allow for the development of Alaska, both as a tourist and vacation area and commercially and industrially." The bill was not considered by the Congressional Committee on Mining or Public Lands. The statutory purposes of a permit are

to promote "residence, recreation, public convenience, education, industry, agriculture and commerce." On recommending passage of the bill, the Department of Agriculture never referred to mining development, indeed asserted only that

> "The proposed legislation would broaden and make more practicable the authority now included in * * * 16 U.S.C. § 497." Sen. Rep. 899, 80th Cong. 1st Sess.

Neither statute includes mining as a purpose for which a permit was issued. The enumerated purposes "can be fully effectuated through an administration of the occupancy and use of the surface of national forest lands without the development of mineral resources." It is clear that Congress did not intend to authorize the Secretary of Agriculture to develop mines and minerals in Alaskan national forests by this statute for such would work a revolution in the management of mineral lands in Alaska. Not only would the Secretary of the Interior be effectively deprived of his jurisdiction over such mineral lands under the Mineral Leasing Laws and Mining Laws, but the Secretary of Agriculture would have the power to develop mines, a power not heretofore conferred even upon the Secretary of the Interior.

4. *Correction Memorandum No.* 11 *was not issued to anyone, nor was it in form a permit.*

There was no evidence that Corrective Memorandum No. 11 was issued to anyone, much less the Bureau of Public Roads. Testimony showed that it was sent from Juneau to the Supervisor of the Southern Division of the Tongass National Forest "to complete our land records" (Tr. 183).

The 37.5 acre tract was not by virtue of Correction Memorandum No. 11 placed "under the jurisdiction and control of the Department of Commerce." (Tr. 209).

Regulations U-10 and U-11 (Tr. 110-122), the claimed authority for a special use permit under 48 U.S.C. § 341 (62 Stat. 100), have the following requirements which plaintiff failed to show or which plaintiff's own evidence shows were violated:

> "Special use permits * * * shall be in such form and contain such terms, stipulations, conditions and agreements as may be required by the Regulations of the Secretary of Agriculture and the instructions of the Chief of the Forest Service.
>
> * * *
>
> "Permits will include the usual stipulation in regard to protection of national forest interests and will provide that the permit will terminate if the permittee does not use the premises as contemplated by Reg. U-11.
>
> * * *
>
> "Free special use permits shall be issued with one 'original', one 'duplicate' and one 'ranger's copy' promptly upon the approval of the appli-

> cation. Section 1 of Form 832, if used, shall be deleted and in its place shall appear 'Issued free of charge under authority of Reg. U-11(*)'."

It is clear that the Correction Memorandum No. 11 did not conform to these regulations.

If Correction Memorandum No. 11 is a special use permit under Regulation U-10 and U-11, then all permits for the other uses mentioned in regulations would also bar mineral entries. Such other use permits include cemeteries, churches, cabins for trappers of predatory animals, stockmen, range facilities, campfires, signs, squatters, and taking motion pictures (Tr. 115-121).

If a document as indefinite in its terms and not even designated a use permit can constitute a withdrawal of mineral land from entry under 48 U.S.C. § 341 (62 Stat. 100), then the mining laws no longer have any practical application to forest lands in Alaska. Any document in the files of the Forest Service describing any tract less than 80 acres would constitute such a withdrawal. It is inconceivable that Congress intended such a result. The history of the mining laws, the fact that the national forests are expressly subjected to the mining laws in as broad terms as possible, and that Congress has found it necessary to pass special laws both before and after passage of 48 U.S.C. § 341 (62 Stat. 100) limiting but not abrogating the min-

ing laws in specified areas of designated forests (see p 30-31, supra), all indicate that Congress could not have intended such a document as Correction Memorandum No. 11 to be a withdrawal.

5. *Plaintiff did not rely upon Correction Memorandum No.* 11 *being a permit under* 48 *U.S.C.* § 341, *prior to or during the trial.*

Prior to trial the plaintiff failed to mention the statute now relied upon in its answers to interrogatories specifically requesting it to state every law and regulation under which it purported to act. Not until after the trial was the statute ever mentioned, although several other statutes were mentioned and relied upon prior to and during the trial.

A recent Court of Claims case, *Chemical Recovery Co., Inc. v. United States,* 103 F. Supp. 1012, 1018 (Ct. Ct.) held the United States liable on a contract nothwithstanding a contention raised at the trial that the plaintiff could not recover because it had assigned the contract in violation of the law. The Court said it was influenced in its refusal to apply the statute:

> "* * * by the fact that the Government's reliance upon the statute is a mere afterthought. Though attempting to marshall all available reason for forfeiting the plaintiff's contract this one never suggested itself to the Government's officers until long after they had refused to perform the contract."

In this case the plaintiff attempted to marshall all its grounds for holding deefndant's mineral location void and set up four separate grounds in paragraphs IV, V, VI and VII of the complaint. The complaint was sworn to on October 3, 1951 (Tr. 11). Defendant filed interrogatories on October 26, 1951 (Tr. 21) requesting the plaintiff to specify each law and regulation plaintiff acted under in making the alleged appropriation. Plaintiff's answers to the interrogatories, filed December 5, 1951 (Tr. 27), did not mention the statute now relied upon. At the time of trial, on January 25, 1952, plaintiff amended its complaint by striking out of paragraph IV of its complaint "36 C.F.R. 251.22" and substituted "an order of the Secretary of Agriculture dated February 1, 1926 and regulations of the National Forest Hanual, pages 57-L and 61-L" (Tr. 122) (Pl. Ex. 1 Tr. 99-108). Thus, for a period of four months, from the time of filing the complaint to and through the trial, plaintiff made no mention of the statute upon which the court based its decision. The plaintiff instead relied upon regulations constituting authority for the appropriation claimed in paragraphs IV and VII of the complaint and as authority for the Regional Forester's claimed appropriation under paragraph V by virtue of the general laws relating to the administration of national forests.

Plaintiff's witnesses never referred to Correction Memorandum No. 11 as a permit. "We withdrew it

by Correction Memorandum No. 11" (Tr. 180); "order . . . setting aside thirty-seven and one-half acres" (Tr. 270); and it was "a final order or a final act setting that property aside;" insofar as the Forest Service was concerned (Tr. 270-271).

IIb. *Correction Memorandum No.* 11 *did not withdraw the lands under authority of* 23 *U.S.C.* § 18.

The lower court, in Findings of Fact VII, stated that Correction Memorandum No. 11 was authorized by 23 U.S.C. § 18 (Tr. 61). All of the considerations mentioned with regard to 48 U.S.C. § 341 apply with even greater force to 23 U.S.C. § 18 (42 Stat. 216). That statute provides for a transfer of lands from the United States to a "State Highway Department" to be used "for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations." (Supra p 7-8)

As the lower court found, however, even this authority was transferred from the Secretary of Agriculture to the Secretary of Commerce by 1949 Reorganization Plan No. 7 (63 Stat. 1070) and 1950 Reorganization Plan No. 5, effective May 24, (64 Stat. 1263 (Finding VII, Tr. 61). There was no evidence whatsoever that either the Secretary of Commerce or any person in the Department of Commerce or the Secretary of Agriculture ever proceeded under that act or complied with its requirements.

While the section of the Act quoted is authorization for the tranfer of lands, it is not an authorization for the issuance of permits allowing removal.

Taking of Sand and Gravel from Public Lands for Federal Air Highways (1933), 54 L.D. 294 (p 51, infra), an opinion by the acting solicitor of the Department of the Interior, approved by then Assistant Secretary Oscar L. Chapman, affirmed that

> "There is no law authorizing the removal of gravel from the public domain for public roads or highways, except as provided in the Federal Highway Act. In view of the fact, however, that public roads and highways are a public benefit it has been the policy of this Department to interpose no objection to the removal of such material from the public domain by state and county officers for road construction purposes as long as there is no substantial damage to the property, although a permit specifically granting such privilege cannot be issued."

III

There was no evidence that plaintiff was in actual possession of any identified part of the 37.5 *acre tract, so as to exclude entry and location under the mineral laws.*

The lower court erred in conclusion of Law II in holding that "there was an appropriation and withdrawal of the road and three-acre area included within the 37.5 acres * * * by actual use and possession." This holding affects only a small portion of defendant's claim, but it is not supported by any

evidence showing actual possession at the time of entry or showing use in any defined area at all.

There was much evidence of intermittent use of the 37.5 acre tract by contractors as a source of gravel. A roadway was bulldozed by one contractor (Tr. 202). Another contractor built a log loading ramp in 1949 (Tr. 146, 207), although no one maintained it or apparently used it after he left (Tr. 208).

According to plaintiff's evidence the last use of the 37.5 acre tract started "June 28, 1950 and continu(ed) on through into December of 1950." (Tr. 135). There was no evidence that anyone worked on the 37.5 acre tract in the intervening six months, and not even an attempt to show that anyone was in possession of the tract on June 21, 1951 when defendant made his mineral entry. It is conceded "that defendant, H. F. Schaub, located such claim openly and peaceably" (Finding of Fact IV (Tr. 59).

There was, therefore, no actual use or possession of the 37.5 acre tract at the time of defendant's mineral entry, nor had there been any such use or possession for six months prior to his entry.

Plaintiff was and is in constructive possession of all the Tongass National Forest. Plaintiff may permit the use of its resources by others. Such permissive use, however, does not abrogate the mining

laws. As was pointed out in *United States v. Tichenor,* 12 Fed. 415:

> "It may also be admitted that General Hitchcock could direct his subalteran, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein, or that the latter might do so under the circumstances without any direction from the former, but such use or occupation would not have the effect to impart any special character to the land or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler."

Actual possession of an area may bar a subsequent entry or location based upon an act of trespass, force, fraud, or clandestine entry. A mineral location may, however, be instituted upon land actually in the possession of another provided the entry is made peaceably. *Cole v. Ralph,* 252 U. S. 286, 40 S. Ct. 321.

Of course, had there been actual occupation of any particular area and a marking upon the ground of some relatively permanent improvement the rule would be otherwise. When telephone lines, road, trials, bridges or government buildings have been constructed with funds appropriated by Congress, the lands actually occupied are devoted to public use and are deemed withdrawn from entry by Act of Congress. *United States v. Fitzgerald,* 15 Pet.

407, 419, *Wilcox v. Jackson,* 13 Pet. 512, *Lyders v. Ickes,* 84 F. (2d) 232 (Ct. App. D.C.)

An opinion, entitled "Roads, Trails, Bridges, etc., in National Forests — Exceptions in Patents" 44 L.D. 513 is the source of that rule of law, but points out that

> "* * * a mere preliminary survey, which might or might not be later followed by construction, is not an appropriation of the land to the public use. It would seem that *some action indicating upon the ground itself that the tract had been devoted to the public use is necessary*—such as staking the area to be retained by the United States * * *." (Italics added.)

It is difficult to conceive that holes in the stream bed left by contractors could constitute actual occupation of that area by the United States, particularly when gravel washes down the stream bed and fills up the pits as they are dug (Tr. 155). A road bulldozed "with a very small amount of work" (Tr. 202) and a log loading ramp never used after 1949 (Tr. 208), both of which were constructed by private contractors for their own use, are not the equivalent of permanent government improvements nor do they convert defendant's entry into a trespass. Certainly the evidence failed to identify any specific area with the particularity of proof re-

quired by *Wilcox c. Jackson,* 13 Pet 498, 513, and *U.S. v. Tichenor,* 12 Fed. 415.

IV.

The court erred in excluding regulations and rulings of the Forest Service.

At the time of trial, as earlier pointed out, plaintiff did not rely upon Correction Memorandum No. 11 as a permit under 48 U.S.C. § 341 (62 Stat. 100). Instead, plaintiff relied upon a 1940 classification of a 91.13 acre tract as a recreation area (Par. 4 of the complaint, Tr. 4). Defendant wished to introduce Regulations U-1, U-2 and U-3, Circular No. U-220 and certain letters to show that such a classification was a device to prevent mineral entry which the Forest Service itself had abandoned. Secondary purposes were to show that a public land order is not effective until published, that Correction Memorandum No. 11 was not in form a permit or for an authorized purpose and that the Forest Service had actually adopted the different and inconsistent procedure of withdrawal by public land order. The regulations were material and relevant because they outlined in detail the steps to be taken and the formal written request actually made by the Forest Service. The lower court could have taken judicial notice of these documents notwithstanding its refusal to admit them in evidence. However, "Defendant's offer of the exhibits for identi-

fication was also refused." (Tr. 72). Thus, there was nothing in the record of which the lower court could take judicial notice. The lower court did not refer to the exhibits in its decision or findings, except to the extent of holding that the public land order related back to the formal written request made by the Forest Service, although it had refused to admit that request into evidence.

No question was or can be raised as to the authenticity of the regulations and formal request for withdrawal as contained in the transcript (Tr. 75-92).

The courts of the United States will take judicial notice of the rules, orders and decisions of the executive departments of the government.

United States v. Penn Foundry & Mfg. Co., 337 U. S. 198, 69 S. Ct. 1009, rehearing denied, 338 U.S. 840, 70 S. Ct. 32 (letter and memorandum by the Navy Department on policy with regard to contracts); *Lilly v. Grand Trunk Western R. Co.,* 317 U.S.481, 63 S.Ct. 347 (I.C.C. safety standards set under the Boiler Inspection Act); *Tucker v. Texas,* 326 U.S. 517, 66, S.Ct. 274 (Regulations of the Federal Public Housing Authority); *Thornton v. United States,* 271 U.S. 414, 420, 46 S.Ct. 585 (quarantine and cattle dipping regulations of the Bureau of Animal Husbandry issued by the Secretary of Agriculture); *Cosmos Exploration Co. v. Gray Eagle Oil Co.,* 190 U.S. 301, 23 S.Ct. 692 (rules and regu-

lations of the Land Department regarding sale or exchange of public lands); *Caha v. United States,* 152 U.S. 211, 14 S.Ct. 513 (rules and regulations of the Department of the Interior with respect to contests before the land office); *Lyon Mill Co. v. Goffee & Carkener,* 46 F. (2d) 241, 246 (C.C.A. 10th) (designation by the Secretary of Agriculture of a contract market within the Grain Futures Act).

Judicial notice may be taken of a letter, *Bowles v. United States,* 319 U.S. 33, 35-36, 63 S.Ct. 912, rehearing denied, 319 U.S. 785, 63 S.Ct. 1323, (where the court relied upon a letter by the Director of Selective Service deciding an appeal where the letter was printed in the brief and "No question has been raised as to the authenticity of this copy.") cf., *United States v. Penn Foundry & Mfg. Co., supra.*

A circular was considered by the Supreme Court in *National Labor Relations Bd. v. E. C. Atkins & Co.,* 331 U.S. 398, 406, 407, 67 S.Ct. 1265, and the court pointed out in a footnote:

> "2. Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it."

These regulations and letter decision, together with the opinion of the Solicitor of the Department

of Agriculture (supra, p 31) and opinions of the Secretary of the Interior (supra, p 41), were and are obviously relevant and material under the familiar rule that:

> "* * * if the question be considered * * * as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early date in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons * * *."

Heath v. Wallace, 138 U.S. 573, 11 S.Ct. 380 (1891) (considering land office decisions and rulings on the question of what were swamp lands and the requirements of a survey determining a grant under that act.

CONCLUSION

Throughout the trial defendant was prepared to meet and sustain the burden of proof required under the mining laws to show that defendant had made a valid entry upon sand and gravel under the mining laws of the United States, i.e., that "by reason of accessibility, *bona fides* in development, proximity to market, and existence of present demand" the deposit was of such value that it could be mined,

removed and disposed of at a profit. Such has been the long established rule regarding sand and gravel mining claims (54 L.D. 294, p 52, infra), *Ickes v. Underwood,* 141 F. (2d) 546 (Ct. App. D.C.), cert. den. 323 U.S. 713, and until the decision of the lower court, the only basis upon which mining claims had been set aside. The long established rule was and is well able to eliminate fraudulent mining claims, 54 L.D. 294, *U.S. v. Lavenson,* 206 Fed. 755 (D.C. Wash.), *U.S. v. Lillibridge,* 4 F. Supp. 204 (D.C. Cal.), *U.S. v. Mobley,* 45 F. Supp. 407 (D.C. Cal.)

A valuable claim, valid under the mining laws, has been set aside on novel grounds never before adopted by any court which, if sustained, might cloud the title or invalidate mining claims throughout the country and result in the withdrawal of the vast area of Alaska lands in National Forests from the mining laws at the pleasure of Regional Foresters or subordinate officers of the Forest Service. It would overturn administrative practice and procedure adopted by the Forest Service and the Department of the Interior. The precedence of the mining laws over National Forest lands and the jealous scrutiny of executive withdrawals have been too firmly established by Congress and the courts to allow such a revolutionary change through judicial interpretation of such a document as Cor-

rection Memorandum No. 11. The judgment of the lower court should be reversed.

Respectfully submitted,

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APPENDIX

Public Land Order 734

(16 *Fed. Reg.* 7329, *published July* 26, 1951)

Alaska

Reservation of lands within Tongass National Forest as a Public Service Site.

By virtue of the authority vested in the President by the act of June 4, 1897 (30 Stat. 34, 36; 16 U.S.C. 473), and otherwise, and pursuant to Executive order No. 9337 of April 24, 1943, it is ordered as follows:

Subject to valid existing rights, the following described tract of public land within the Tongass National Forest in Alaska is hereby withdrawn from all forms of appropriation under the public-land laws, including the mining laws but not the mineral leasing laws, and reserved for the use of, and administration by the Forest Service, Department of the Interior, as the Whipple Creek Public Service Site:

Beginning at a point on the southeast boundary of U. S. Survey No. 2802 from which corner No. 1 of said survey bears N. 30° E., 200 feet, thence by metes and bounds:

N. 30° 00′ E., 817.0 feet to corner No. 6 of U.S.S. 2803;

N. 46° 30′ E., 860.0 feet;
S. 43° 30′ E., 1,080.0 feet;
S. 46° 30′ W., 1,160.0 feet;
S. 83° 57′ W., 548.0 feet

to PC566 + 57.4 on southeast edge of the right-of-way of North Tongass Highway;
Southerly and westerly, 353.0 feet parallel to and 33 feet from the centerline of North Tongass Highway;
N. 12° 00′ W., 437.0 feet to point of beginning.

The tract described contains approximately 37.5 acres.

This order shall take precedence over, but not otherwise affect, the existing reservation of the lands for national-forest purposes.

OSCAR L. CHAPMAN,
Secretary of the Interior

July 20, 1951
(I.R. Doc. 51-8572; Filed, July 25, 1951; 8:46 a.m.)

Executive Order 9337
(8 Fed. Reg. 5516 April 28, 1943)

Authorizing the Secretary of the Interior to Withdraw and Reserve Lands of the Public Domain and Other Lands Owned or Controlled by the United States.

By virtue of the authority vested in me by the act of June 25, 1910, Ch. 421, 36 Stat. 847 [43 U.S.C. §141], and as President of the United States, it is ordered as follows:

Section 1. The Secretary of the Interior is hereby authorized to withdraw or reserve lands of the public domain and other lands owned or controlled

by the United States to the same extent that such lands might be withdrawn or reserved by the President and also to the same extent, to modify or revoke withdrawals or reservations of such lands. *Provided,* That all orders of the Secretary of the Interior issued under the authority of this order shall have the prior approval of the Director of the Bureau of the Budget and the Attorney General, as now required with respect to proposed Executive Orders by Executive Order No. 7298 of February 18, 1936 and shall be submitted to the Division of the Federal Register for filing and publication:*Provided, further,* That no such order which affects lands under the administrative jurisdiction of any executive department or agency of the government, other than the Department of the Interior, shall be issued by the Secretary of the Interior without the prior concurrence of the head of the department or agency concerned.

Section 2. This order supersedes Executive Order No. 9145 of April 24, 1942 entitled "Authorizing the Secretary of the Interior to Withdraw and Reserve Public Lands."

FRANKLIN D. ROOSEVELT

The White House,
April 24, 1943

F.R. Doc. 43-6460; Filed, April 26, 1943, 3:15 p.m.

SAND AND GRAVEL AS A MINERAL

TAKING OF SAND AND GRAVEL FROM PUBLIC LANDS FOR FEDERAL AID HIGHWAYS

(Excerpts from Opinion, September 21, 1933)

(54 L.D. 294)

* * *

In *Layman et al. v. Ellis, supra,* the Department held (syllabus) that—

> "Gravel is such substance as possess economic value for use in trade, manufacture, the sciences, and in the mechanical or ornamental arts, and is classified as a mineral product in trade or commerce.
>
> Lands containing deposits of gravel which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws."

The reasons for the above-stated conclusions were elaborately set forth in the opinion in the case and need no restatement here. It suffices to observe that upon examination of this case it appears that the Department followed and applied the principle which it had applied in other cases there cited, involving the locality of other kinds of commonplace stones used for construction and manufacturing purposes—the same principle that had been consistently applied by the courts, namely, that in the solution of the question whether lands containing a given mineral substance were subject to location

and purchase under the mining laws, the test was the marketability of the product.

It was pointed out that there was no logical reason for discriminating between sand and gravel, if marketable at a profit, and other low grade deposits of wide distribution, used for practically the same or similar purposes, which also met the same test; that the distinctions assigned in the Zimmerman case for excepting sand and gravel from the rule were unsubstantial and that the doctrine of that case had been vigorously criticized by the leading text-writers on the mining law.

The main objection that appeared to the application of this principle to such commonplace substances as sand and gravel, was that it would render facile the acquirement of title to numerous areas containing sand and gravel for other purposes than mining, but this objection may be urged with as much reason against other mineral substances of wide occurrence and extent which under the same limitations and qualifications are locatable and enterable under the mining law, such as, for example, limestone, marble, gypsum, and building stone. Furthermore, the objection mentioned is not of much force when it is considered that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is

of such value that it can be mined, removed and disposed of at a profit. Cases have been frequent where the Department has refused patent to lands containing the mineral substances last mentioned in abundance, where the evidence as to the value of the deposit was insufficient or lacking. No reason is seen, therefore, to overrule the case of *Layman et al. v Ellis*. It follows that sand and gravel which can be extracted, removed, and marketed at a profit, obtained from land that has been duly and properly located under the mining law as a placer claim, may be lawfully disposed of for use, not only on Federal aid highways, but for other purposes.

LAYMAN ET AL. v. ELLIS

Decided October 16, 1929

(52 L.D. 714)

(Excerpts from Opinion)

* * *

Bad faith in making the entry not being established, the question arises whether the entry or any part thereof was invalid because of the existence of gravel deposits thereon admittedly valuable. The question is not new. In *Zimmerman v. Brunson, supra,* it was held (syllabus) that—

> "Deposits of gravel and sand, suitable for mixing with cement for concrete construction, but having no peculiar property or characteristic giving them special value, and deriving their chief value from proximity to a town, do not render the land within which they are found mineral in character within the meaning of the

> mining laws, or bar entry under the homestead laws, notwithstanding the land may be more valuable on account of such deposits than for agricultural purposes."

Although the commissioner held that he was governed by the rule in *Zimmerman v. Brunson, supra,* he was of the opinion that valuable deposits of gravel should be held subject to appropriation under the mining law for the reason that they are valuable mineral deposits, and that the rule in that case should be modified.

Data are presented contained in publications of the Geological Survey, entitled "Mineral Resources of the United States," as evidence of the marked increase in production, use and price of this commodity since 1909, when the decision in the *Zimmerman case* was rendered. Supplementing the data presented by the commissioner, this series of publications show that in 1909 there was sold and used in the United States 23,382,904 tons of gravel of all kinds of the value of $5,719,886, of which amount California produced 914,035 tons, valued at $169,-476 (1910, Part 2, p. 602); that in 1927 the combined tonnage of building, paving and railroad ballast gravel used and sold in the United States was 103,865,930 tons, valued at $51,238,388. Of this amount California produced 2,460,072 tons of paving gravel alone of the value of $1,177,086 (1927, Part 2, pp. 160-181). The commissioner's statement

also appears to be correct that "according to these tables in 1927, California produced over seven times the amount it did in 1909, the value of the 1927 production being over 26 times the value in 1909." The tables for the year 1927 also show an average value throughout the United States of all gravel sold of 67 cents per ton. A noteworthy feature in recent years is the growth in size and number of large plants producing washed or otherwise cleaned gravel and crushed stone of standardized grading and size, bringing about keen competition between gravel and crushed stone for wide market areas in contrast to the strictly local market of a few years ago, this competition developing controversies and discussion as to zone and commodity freight rates. (1925, Mineral Resources, Part 1, p. 47). In these publications gravel and sand have uniformly been classed as a mineral resource. They are also included in the list of useful mineral supplies (U.S. Geological Survey Bulletin No. 666).

From what has been stated there can be no question that gravel deposits are definitely classified as a mineral product in trade and commerce and have a pronounced and widespread economic value because of the demand therefor in trade, manufacture, or in the mechanical arts.

The *Zimmerman case* quotes the rule in *Pacific Coast Marble Co. v. Northern Pacific R.R. Co. et al.*

(25 L.D. 233), frequently since applied as a test of the mineral character of land, reading as follows (p. 244):

> "Whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substance, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws."

But it was nevertheless attempted to take the deposit under consideration from the rule, *first,* because the standard authorities have failed to classify sand and gravel as mineral, and *second,* because the deposit had no special property or characteristic giving it special value, and *third,* its chief value arose from industrial conditions peculiar to the locality where the deposit was found.

The deposit here is characterized as beach gravel. Gravel is variously defined as "fragments of rock worn by the action of air and water larger and coarser than sand" (Glossary of the Mining and Mineral Industry, U.S. Geological Survey Bulletin No. 95), as "more or less rounded stones and pebbles often intermixed with sand" (28 C.J. 824), as "sand fragments of mineral, mainly quartz" (Bayley on Mineral and Rock, p. 202). Many of the beach pebbles are composed largely of quartz, because it is the most common mineral which physically and

chemically can resist the wear of wave action. Diller, Education Series of Rock Specimens (U.S. Geological Survey Bulletin No. 150, p. 57). The distinction between sand and gravel is largely one of gradation in size. (Item 59). As gravel is not composed always of the same mineral substances, it would not be expected that gravel would appear in a strict mineralogical classification based on definite chemical composition, but examination of the decisions of the department and the courts disclose that questions whether given substance is locatable or enterable under the mining law are not resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula. Such a criterion would exclude a number of mineral substances of heterogeneous composition that have been declared to be subject to disposition under the placer mining law, for example, guano, granite, sandstone, valuable clays other than brick clay, which may be made up of a number of minerals and not always the same minerals.

In Lindley on Mines, Section 98, after review of the adjudicated cases and rulings of the department, deductions, which seem warranted, are made as to when the mineral character of public land is established. It is stated—

"The mineral character of the land is estab-

lished when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

"And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

That valuable gravel deposits fall within categories (b) and (c) of Mr. Lindley can not be disputed.

Good reason also exists for questioning the statement that gravel has no special properties or characteristics giving it special value. While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state.

As to the third ground for exclusion in the *Zimmerman case,* it has not been shown that the gravel deposits in this case derive their value from the proximity between place of production and use, and as heretofore indicated gravel is generally recognized as having special characteristics that render it valuable generally in the mechanical arts. The conclusion, hardly justified when the decision in the *Zimmerman case* was rendered, that the value shown was one arising chiefly from exceptional and peculiar conditions in the locality where the deposit in question was found, is not warranted under present conditions.

In *Northern Pacific Railway Co. v. Soderberg* (188 U.S. 526, 534) it was held that the overwhelming weight of authority was to the effect that mineral lands include not merely metalliferous minerals, but all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture, and the opinion quotes with approval certain observations in *Midland Railway v. Checkley* (L.R. 4 Eq. 19), reading—

> "Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is *gravel,* marble, fire clay, or the like, comes within the word

'mineral' when there is a reservation of the mines and minerals from a grant of land."

. . . .

In *Loney v. Scott* (122 Pac. 172) the Supreme Court of Oregon held that building sand worth 50 cents per cubic yard, and marketable in large quantities, as shown by the Director of the Geological Survey in his Reports of Mineral Resources, was mineral land and subject to location under the placer mining law, and that a patent issued to a railroad company under its place land grant carried no title to such deposits then known to be embraced in a placer mining claim.

The Secretary of the Treasury has held that gravel bought as ballast is entitled to free entry as crude mineral. (25 T.D. 627) Applying the rule in the *Pacific Coast Marble Company case, supra,* the department has held that land of little value for agricultural purposes, but which contains extensive deposits of volcanic ash, suitable for use in the manufacture of roofing material and abrasive soaps and having a positive commercial value for such purposes is mineral land not subject to disposition under the agricultural laws (*Bennett et al. v. Moll,* 41 L.D. 594); that trap rock particularly suitable, and profitably marketable as railroad ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit (*Stephen E. Day, Jr., et al.,* 50 L.D. 489); that am-

phibole schist, particularly resistant to the action of water, occurring in proximity to the place of use, and with easy facilities for its transportation, and marketable at a profit for use in the building of a local jetty, was enterable under the mining law (Lee Davenport *et al.,* decided March 20, 1926, unreported); that deposits of fractured granite not serviceable as building stone suitable for rip rap on breakwaters and embankments and useful as railroad ballast and road material, which could be quarried and delivered at a profit and taken from land of no agricultural value, was subject to disposition under the mining law (Charles F. Guthridge, A. 11785, decided August 3, 1928, unreported).

It seems apparent in the *Zimmerman case* and cases based on the same reasoning that the rule in the *Pacific Coast Marble Company case* was not followed, but disregarded on unsubstantial grounds. It has been vigorously criticized by leading text writers on the mining law. (See Lindley on Mines, section 424; Snyder on Mines, section 124). There is no logical reason in view of the latest expressions of the department why, in the administration of the Federal mining laws, any discrimination should be made between gravel and stones of other kinds, which are used for practically the same or similar purposes, where the former as well as the latter can

be extracted, removed and marketed at a profit. The rule in *Zimmerman v. Brunson* will therefore no longer be followed but is overruled.

* * *

No. 13685

In the United States Court of Appeals for the Ninth Circuit

H. F. SCHAUB, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA—FIRST DIVISION

BRIEF FOR THE UNITED STATES

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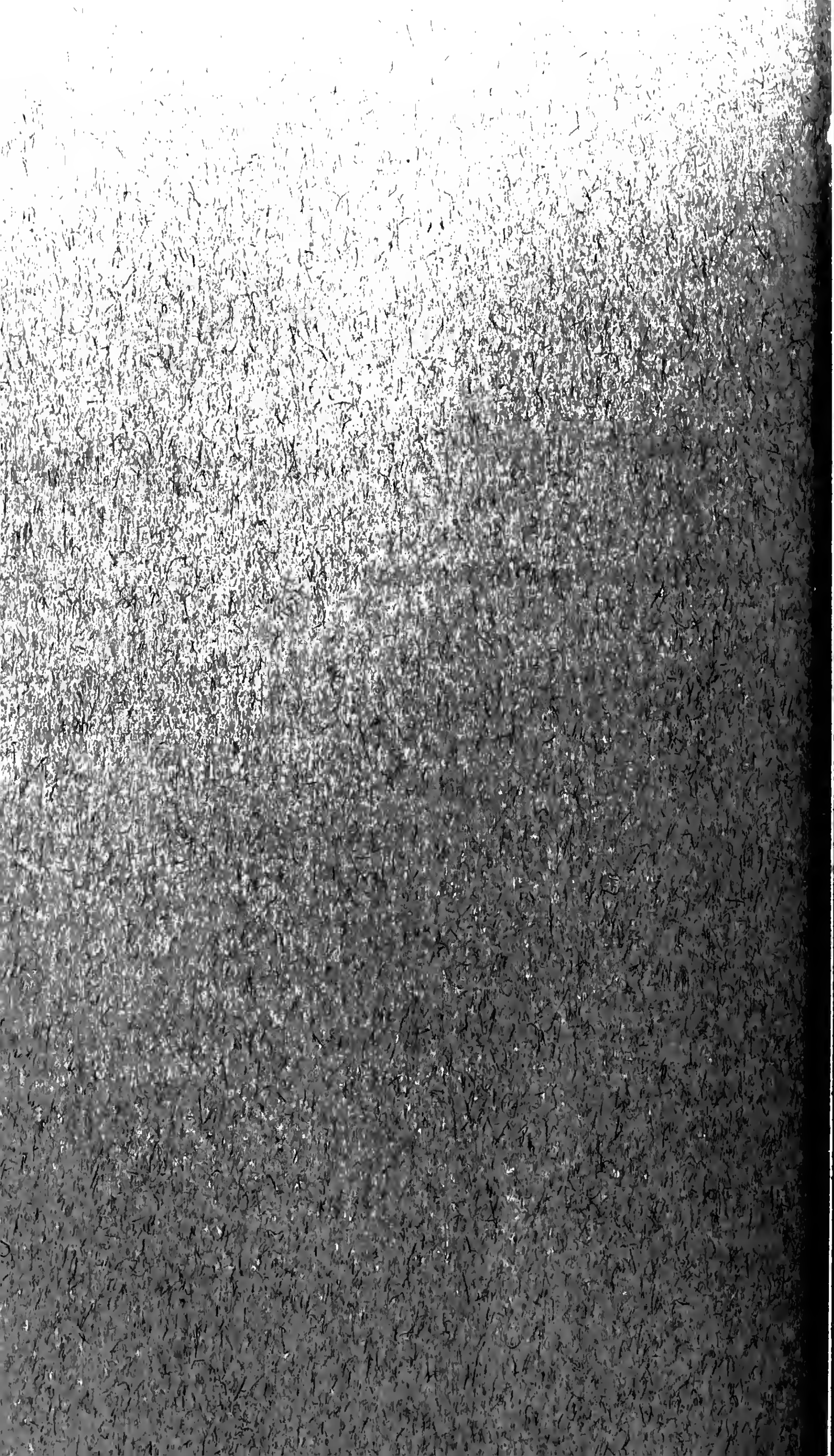
FILED

JUN - 8 1953

PAUL P. O'BRIEN
CLERK



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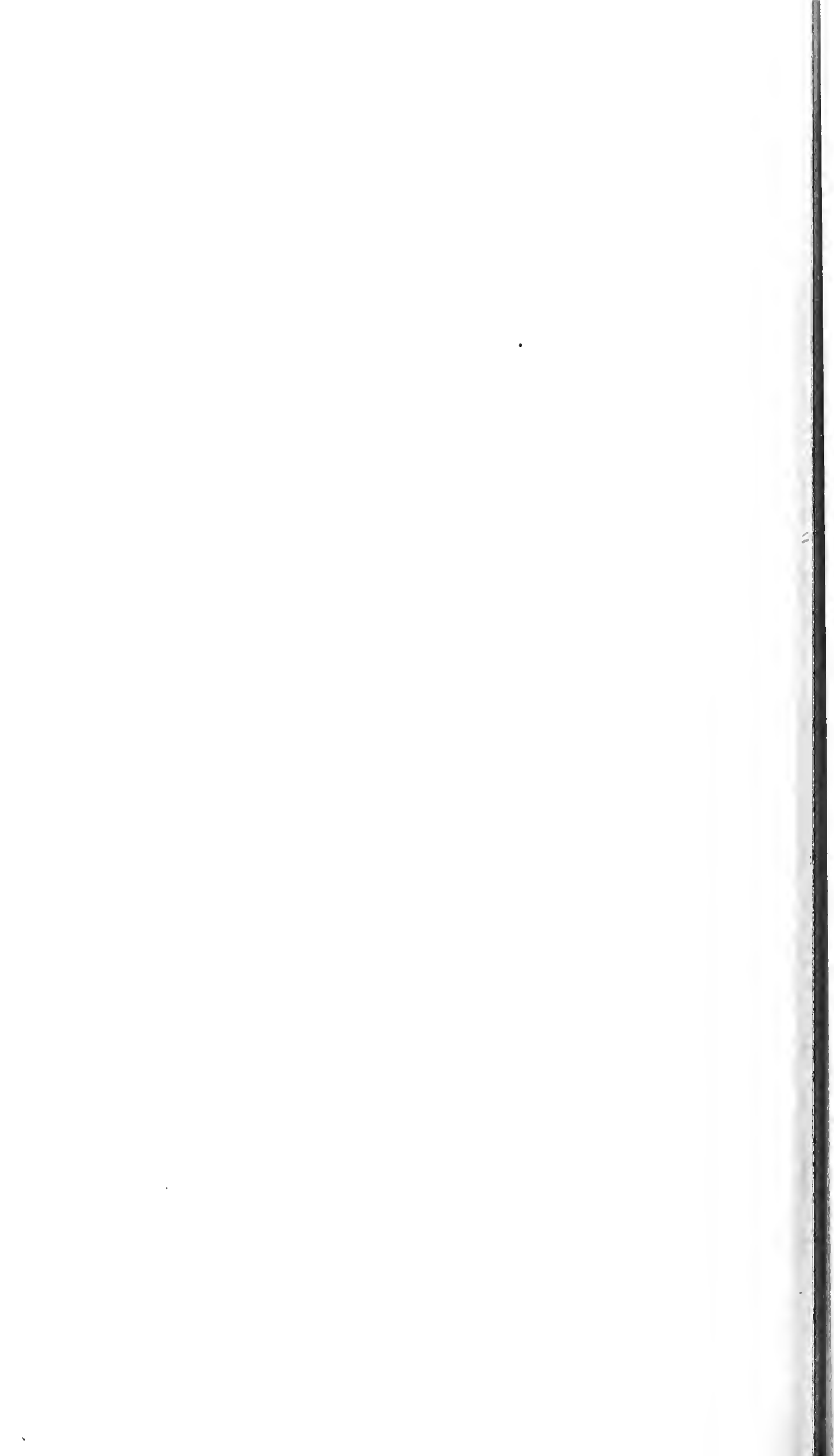

In the United States Court of Appeals for the Ninth Circuit

No. 13685

H. F. Schaub, appellant

v.

United States of America, appellee

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY, OF ALASKA FIRST DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court is reported at 103 F. Supp. 873 (R. 47–54).

JURISDICTION

This is an appeal from a judgment entered May 17, 1952, enjoining appellant from taking gravel or asserting any right to do so from a certain tract of land (R. 66–69). Notice of appeal was filed July 2, 1952 (R. 69). The jurisdiction of the district court was invoked by the United States under 28 U. S. C. sec. 1345. The jurisdiction of this Court is sought to be invoked under 28 U. S. C. sec. 1291.

QUESTIONS PRESENTED

1. Whether an area which had been developed as a gravel pit by the United States and was in its actual use and possession could be included in a location under the mining laws.

2. Whether under the statutes here involved, the 37.5 acre tract of land was validly withdrawn against operation of the mining laws before appellant staked a claim to a part of the area.

STATUTES INVOLVED

The Act of March 4, 1915, c. 144, 38 Stat. 1100, as amended, 16 U. S. C. 492, provides as follows:

> Hereafter the Secretary of Agriculture, under regulations to be prescribed by him, is authorized to permit the Navy Department to take from the national forests such earth, stone, and timber for the use of the Navy as may be compatible with the administration of the national forests for the purposes for which they are established, and also in the same manner to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska. * * *

The Act of March 30, 1948, c. 162, 62 Stat. 100, 48 U. S. C. 341, provides as follows:

> The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for purposes of residence, recreation, public convenience, education, industry, agriculture, and commerce, not incompatible with the best use and management of the national forests, for such periods as may be warranted but not exceeding thirty years and for such areas as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws.

STATEMENT

On October 3, 1951, the United States filed a complaint seeking an injunction and damages against the appellant, on the grounds that he was unlawfully claiming a right, and had posted a notice of such right, on a part of a tract of land of 37.5 acres belonging to the United States which previously had been reserved for use of the Bureau of Public Roads as a source of road building material.[1] The property is located in the Tongass National Forest, Revillagigedo Island, Alaska, located on and near Whipple Creek, about 11.5 miles north of the City of Ketchikan (R. 3–10). The background for this proceeding may be summarized as follows:

From 1934, at various times, until 1951, the Bureau of Public Roads and other agencies of the Government removed gravel from the Whipple Creek area for the general construction, extension, maintenance and repair of the North Tongass Highway and other roads in the area, a considerable amount of which was removed from the area claimed by appellant (R. 124–125, 128–130, 174–176, 188, 223–224, 260–261, 278–280). In 1935, the Regional Forester looked the area over with the idea of planning for recreational purposes, and in 1940 he set apart and appropriated as a public service site a tract of 91.13 acres of land, of which the 37.5 acres here involved and the area claimed by appellant were a part. The Civilian Conservation Corps improved the tract by brushing out trails, clearing underbrush, and cutting trails on each side

---

[1] Appellant's claim comprises 17.54 acres, more or less, and overlaps the Government's 37.5 acre tract (R. 59, 125). Appellant's Notice of Location of Placer Claim states that the claim is for twenty acres (R. 300–301).

of Whipple Creek, for use as a recreational area (R. 4, 126, 127, 154–155, 209–210, 270).

Between 1948 and December 1950, the Forest Service, through contractors, and the Bureau of Public Roads removed approximately 35,000 cubic yards of borrow fill, sand and gravel for the purpose of constructing minor roads for the Forest Service, from the area claimed by appellant (R. 129–137, 141–144, 155, 162, 216). The Government, through contractors, improved the area by building over a thousand feet of roadway which parallels the gravel pit, by building a log loading ramp whereby a bulldozer would shove gravel up the ramp through a hole and load trucks by gravity (R. 146–147, 207, 218–219), and by removing a considerable amount of overburden (R. 159). The road was laid out so it would be accessible to the Forest Service in developing the gravel pit (R. 161). Whipple Creek was originally ten to fifteen feet wide. It was covered with trees, brush and windfalls. The gravel pit as developed, covers approximately 2.9 acres, extends 1600 feet, the entire length of appellant's claim and averages 80 to 100 feet in width. Holes twenty feet deep have been dug in the pit only to be refilled by action of the stream. The water of the creek has been directed from side to side in washing away the overburden and silt. The stream bed has been lowered fifteen feet (R. 141–146).

In 1949 and 1950, the Bureau of Public Roads made a survey to investigate the amount of gravel in this pit. It did a great deal of work in this area to prospect and prove that the material was there in sufficient quantity to justify setting it aside for a major project which was then planned. It was estimated there were about 300,000 cubic yards of

gravel in the pit. The project included the construction, improvement and maintenance of the North Tongass Highway, about six and one-half miles long, and surfacing it with crushed gravel and crushed gravel material for future pavement. As far back as 1950, it was planned for this project to include removal of gravel from the pit, which is a part of the area appellant claims.

In October 1950, the Bureau of Public Roads made the first formal request of the Forest Service that this gravel pit area be set aside for gravel purposes, and prepared a map showing the original 91.13 acres, the 37.5 acres and the gravel pit (R. 140, 252–253). By letter of January 31, 1951, the Bureau of Public Roads requested the Forest Service to set aside 37.5 acres of land, for the purpose of supplying road-building materials for construction and maintenance of forest highways and forest road development projects, for use of both the Bureau of Public Roads and the Forest Service (R. 4–6, 137–143, 178, 218). By Correction Memorandum No. 11, dated February 9, 1951, the 37.5-acre tract was so reserved by the Regional Forester (R. 4–5, 11–12, 138–139, 179–180, 270–271). Insofar as the Forest Service was concerned in regard to appropriating that area for use of the Bureau of Public Roads, that order was final (R. 270–272). However, following its custom, on February 7, 1951, the Chief Forester wrote a letter to the Forest Service, of the Department of Agriculture in Washington, requesting the withdrawal of the area, for the purpose of avoiding possible litigation in the future, and to protect it against unscrupulous mineral claimants (R. 5, 75, 181–185, 271–272). This was done by Public Land Order No.

734,[2] dated July 20, 1951, published July 26, 1951, in 16 Federal Register 7329 (R. 5, 76–77, 186).

On June 21, 1951, appellant posted a claim to about 20 acres which overlap the 37.5 acres of land here involved. He measured off the distance with a tape and compass, and upon completing boundary lines put a discovery post and stakes at the corners of his location. The discovery post is located at the upper end and a few feet over the boundary of the 37.5 acres withdrawn by the Government. He made a notice for location of a placer claim and filed it in the Recorder's Office (R. 6, 125, 147–148, 158, 296–302). On August 22, 1951, appellant erected barricades across the right-of-way constructed by the Government for ingress and egress, the only entrance to the gravel pit. He later placed a trailer house upon the area, removed timber and overburden, and mined and removed sand, gravel and stone, preventing the Government from obtaining gravel for the construction and maintenance of the highway, and requiring it to haul gravel a long distance for repair of the road (R. 6–9, 266, 280).

This is the only source from which the Bureau of Public Roads can get any material within the economic range, and it is going to have a continuous program there for years to come. It plans to construct three miles of forest development roads for the Forest Service, which will require approximately 15,000 cubic yards of gravel, and a road from Whipple Creek out to the end of the present

[2] An error appears in the printing of the order (Br. App. 48) in next to the last line of the second paragraph. It should read, "Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of the Interior, as the Whipple Creek Public Service Site."

system for reconstruction, about four miles, which will require 75,000 cubic yards of gravel. The present project will require about 115,000 cubic yards (R. 174–177, 224–230, 249–253, 256–257, 263–269).

The specifications on the contract for the construction of the North Tongass Highway were received in the spring of 1951, and the money was appropriated for it on June 2, 1951 (R. 286). On July 20, 1951, the Bureau of Public Roads advertised for bids, and the contract was awarded to Manson-Osberg Company (R. 8, 228–229). At the time the contract was prepared, the local officials of the Bureau of Public Roads knew appellant had filed a mining location on the Whipple Creek area. However, it previously had been decided that gravel was to be taken from this pit, and the contract made it mandatory that the material was to be taken therefrom, since it is the only source of that quality of material within a reasonable haul of the project (R. 229–230, 237–240, 256–257).

This suit having been filed on October 3, 1951, an order granting a preliminary injunction was entered on October 15, 1951 (R. 12–14). After a trial, the court filed an opinion (R. 47–54, 103 F. Supp. 873) in which it held: that the Government was in actual use and possession of the area embracing the gravel pit and access road, had made valuable and permanent improvements therein, and it could not lawfully be included in a mineral location. It further held that the special use permit issued February 9, 1951 (Correction Memorandum No. 11), was sufficient to withdraw the land so that it was no longer open to entry or location under the mining laws; that the order of the Secretary of the Interior issued after appellant staked his claim related back to the request for withdrawal of

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February 9, 1951, and that appellant's claim is invalid. Findings of fact and conclusions of law to this effect were filed (R. 58-65), and a judgment was entered permanently enjoining appellant from using and occupying the land and mining and removing sand, gravel and stone therefrom (R. 66-69). This appeal followed (R. 69).

ARGUMENT

I

The area embraced in the gravel pit and access road in the actual use and possession of the Government could not be included in a location under the mining laws

In order that a locator may obtain a right to mining property by virtue of his location, it must be made upon the unappropriated lands of the United States. Here the Government's development, actual use and occupancy of the area constituted an appropriation or severance of the land from the public domain no less than if it had been done by Act of Congress or Executive Order. Appellant recognizes that such acts may remove the lands from operation of the mining laws (Br. 40), referring to actual occupation of any particular area and a marking upon the ground of some relatively permanent improvement. See *Scott* v. *Carew*, 196 U. S. 100 (1905),[3] and cases there cited.

The court found (Finding V) "That since 1934 plaintiff has used part of the tract bordering Whipple Creek as a source of sand and gravel in connection with the construction and maintenance of forest highways, roads and trails," and particularly described that use (R. 59-60).

[3] This decision makes clear the meaning of *United States* v. *Fitzgerald*, 15 Pet. 407 (1841), and *United States* v. *Tichenor*, 12 Fed. 415 (D. Ore., 1882), relied upon by appellant (Br. 40).

This finding is amply supported by evidence, as shown in the statement (pp. 3–4 *supra*). The Forest Service, the Bureau of Public Roads, and other governmental agencies, directly and through contractors, have used gravel from the area embracing the pit since 1934, for constructing and maintaining forest and public roads. The pit was developed and improvements were made by the Government for the sole purpose of providing a source of material for its use in administering the Tongass National Forest and the construction and maintenance of roads and highways. It cannot be presumed that this bounty was designed for the benefit of the appellant or any other individual at the sacrifice of the public interests.

Appellant attacks Conclusion of Law II (R. 63) that there was an appropriation and withdrawal of the road and three-acre area by actual use and possession as described in the findings (R. 38–39), on the ground that the United States was not in actual possession at the time of appellant's entry under the mining laws, but the finding and the evidence are both perfectly clear that the Government had been in actual possession of the designated area for several years, and had made improvements appropriate to the use to which the property was put. There is no merit to appellant's assertion that the roadway which had been bulldozed and the loading ramp which had been constructed, together with the removal of the overburden of trees, brush, windfalls and soil "are not the equivalent of permanent government improvements" (Br. 41). Cf. *Lyders* v. *Ickes*, 84 F. 2d 232, 234 (App. D. C. 1936), where it was assumed that the quarrying of rock from the island would have constituted an appropriation. As the Court stated in *United States* v. *Fullard-Leo*, 331 U. S.

256, 279 (1947), "The sufficiency of actual and open possession of property is to be judged in the light of its character and location." No further acts of possession could have been done by the Government to constitute possession of this gravel deposit in Alaska short of continuous operation of it, regardless of weather. The evidence is clear that the Government had every intention of using the material from this pit, and had no intention of abandoning it. In order to constitute abandonment of the right of possession, there must be shown a clear and unequivocal act showing a determination to surrender such right to the property. There must be the concurrence of intention to abandon and the actual relinquishment of the property. *Equitable Life A. S.* v. *Mercantile-Commerce B. & T. Co.*, 155 F. 2d 776, 780 (C. A. 8, 1946), certiorari denied 329 U. S. 760; *Helvering* v. *Jones*, 120 F. 2d 828, 830 (C. A. 8, 1941), certiorari denied 314 U. S. 661; *In re Stilwell*, 120 F. 2d 194, 195 (C. A. 2, 1941); *Ritter* v. *Lynch*, 123 Fed 930 (C. C. Nev. 1903).

Appellant's argument (Br. 38–41) based upon the fact that no work had been done for six months prior to his entry, ignores the evidence regarding the survey which had been made for the purpose of determining the amount of gravel which could be obtained for the construction of the North Tongass Highway and other projects which were being planned (R. 174, 224). It also ignores the evidence that the specifications on the contract for the construction of the highway were received in the spring of 1951, and the money therefor was received on June 2, 1951 (R. 286); and that in 1950 and 1951, the Bureau of Public Roads publicized the fact that it was going to build this road (R. 232–236). Appellant knew the

highway was to be constructed, and admitted that it was general knowledge that gravel for the highway was to be taken from the Whipple Creek gravel pit (R. 308–309). Furthermore, this six-month period, from December, 1950 to June, 1951, was the time of the year when very little work of this kind is done due to weather conditions, particularly since gravel washed down the stream to fill the holes which had been dug (R. 141, 160). Even under the mining laws (30 U. S. C. sec. 28, 48 U. S. C. sec. 381a), a locator of a mining claim is required to do only a limited amount of labor each year for the purpose of prospecting or developing the location pending the issuance of a patent.

Moreover, appellant made no discovery under the mining laws (30 U. S. C. sec. 21, et seq.)[4] but simply staked a claim to a valuable deposit of sand and gravel which had been discovered and developed by the Government (R. 298), the only source in a reasonable distance to town "that you can economically produce sand and gravel aggregates for Ketchikan" (R. 292). He first saw it in 1940 and it was tangled with brush, trees and underbrush. It has been cleared since then by the Government until "you can look up that stream, oh, about a thousand feet" (R. 302). Appellant testified that he has been in the back end of the creek many times, and "seeing these past operations in the year, there was no need for me to do any exploration work" (R. 296). Thus, by his own

[4] The mining laws of the United States have been extended to Alaska, 48 U. S. C. sec. 381, 381a. The opinion in *Cole* v. *Ralph*, 252 U. S. 286 (1920) contains, at pages 294–296, a general statement of the purpose and effect of the mining laws. Appellant's citation of this case (Br. 40) is to the paragraph summarizing the rights "in advance of discovery," and has no relevance to the present case where the discovery had been made long prior to appellant's attempted entry.

admissions, he has done nothing to develop this area, but has sought to take the results of the Government's development of this gravel pit while in its use and possession, which is contrary to the intent of the mining laws. *Gwillim* v. *Donnellan*, 115 U. S. 45 (1885); *Cole* v. *Ralph*, 252 U. S. 286 (1920). If the Government had been a private locator, appellant's entry clearly would have been invalid. Certainly the Government should be in no worse position in the use of its own property.

For these reasons, we submit that, under any view, the judgment of the court below so far as it relates to the road and the three acre area is clearly correct.

II

The 37.5 acre tract of land was officially reserved for the use of the Bureau of Public Roads and was not subject to location under the mining laws when appellant staked his claim

The reservation of this tract for use of the Bureau of Public Roads as a source of road building material is authorized by the Acts of March 4, 1915, c. 144, 38 Stat. 1100, as amended, 16 U. S. C. 492, and March 30, 1948, c. 162, 62 Stat. 100, 48 U. S. C. 341. Pursuant to these statutes, the Secretary of Agriculture issued Regulations U–10 and U–11 (R. 109–122) (36 C. F. R. 251.1, 251.2 (1949 ed.)), authorizing the issuance of "Special use permits." Correction Memorandum No. 11, which is in legal effect a special use permit, was issued by the Regional Forester, upon authorization delegated to him (R. 112–113). The withdrawal of the land was authorized under the above-mentioned acts and regulations and the name and form of the instrument of withdrawal are immaterial. No particular form is necessary for the withdrawal or reservation of public lands. It is sufficient if the announce-

ment thereof has such publicity as to accomplish the end to be attained.[5] *Wolsey* v. *Chapman*, 101 U. S. 755, 769–770 (1879); *United States* v. *Payne*, 8 Fed. 883, 888 (W. D. Ark. 1881); *United States* v. *Midwest Oil Co.*, 236 U. S. 459 (1915). The title to the land stood in the name of the United States and it remained in the United States. The effect of the instrument was to take the property out of the control of one and lodge it in the control of another set of government officials, while the title remained in the same status as it had been before. *Gibbs* v. *United States*, 150 F. 2d 504, 508 (C. A. 4, 1945), certiorari denied 326 U. S. 771.

Appellant argues at length (Br. 25–35) that Correction Memorandum No. 11 was not a special use permit under 48 U. S. C. sec. 341 primarily on the ground that if it was Public Land Order 734 would have been unnecessary. The court referred to it as a special use permit throughout its opinion and correctly held that it was sufficient to make the withdrawal (R. 50–54). The only necessity for the issuing of Public Land Order 734 was to make the withdrawal of the area perpetual for the use of the Bureau of Public Roads, since sec. 341 gives the Secretary of Agriculture power to permit the use and occupancy of national forest lands in Alaska for a period not exceeding thirty

[5] Appellant's argument (Br. 35–37) that the Government did not rely upon 48 U. S. C. 341 as the basis for Correction Memorandum No. 11 is irrelevant here, since it has no tendency to show that the statute does not constitute authority for the action taken. It should be noted that in Government's Exhibit 2, Regulations U–10 and U–11 (R. 110–122) specifically refer to the Act of March 30, 1948, 62 Stat. 100. Appellant made no objection to the admission in evidence of the regulations which cite the statute (R. 98–99, 108–109). The amendment to paragraph IV of the complaint, mentioned by appellant (Br. 36), has no bearing on the present question, which relates to the separate ground of the complaint asserted in paragraph V (R. 4).

years. The material will be needed by the Government as long as it maintains public and forest roads in this vicinity. This source is constantly replenished by high water washing material down the stream and filling up the holes where gravel is removed (R. 138–141). Since the Secretary of the Interior has exclusive jurisdiction to pass upon mineral claims in all public lands, it was sound business practice for the Secretary of Agriculture, or his representative, in order to apprise the Secretary of the Interior that the land was withdrawn under sec. 341, to request that he formally withdraw it from the operation of the mining laws.[6] The lower court correctly held that this withdrawal by the Secretary of the Interior was a confirmation of the withdrawal as of the date of Correction Memorandum No. 11, or related back to that date. Any view that this special use permit alone was insufficient to withdraw the tract from location under the mining law as argued by appellant runs contrary to the express provision of sec. 341. That withdrawal was fixed by law, and no officer of the United States, either through a misconception by him of the legal effect of that withdrawal or by securing a further confirmation of the withdrawal by the Secretary of the Interior, can lessen in any degree the legal effect of the first withdrawal. Moreover the intention that Correction Memorandum No. 11 should be a definitive act and not merely a preliminary step to issuance of the Public Land Order is clear from the fact it

[6] Another apparent reason for the issuance of the order, as shown by Circular No. U–220 (R. 78–82), was to remove all doubt that areas needed for public use were protected against subsequent mineral location. This circular applies to the Forest Service generally, but the statutes here involved (p. 2, *infra*) apply only to Alaska.

stated that the tract "is hereby reserved" and two days after its execution it was placed in the land records of the Tongass National Forest (R. 11, 182–185).

There is nothing inconsistent in the application for Public Land Order 734 and the permit and order, as contended by appellant (Br. 26–28), because the permit could be for only thirty years, and this type of use could not interfere with an oil and gas lease. It is just good business and the usual practice to get the increased revenue if any can be had from any Government properties. By securing the Public Land Order the Bureau of Public Roads has a permanent withdrawal instead of a thirty year withdrawal and different conditions which would be to the advantage of the Government. Appellant's argument that by withdrawing the lands from the operation of the public land laws, including the mining laws, "but not the mineral leasing laws," the Secretary of the Interior gave the Secretary of Agriculture less than he had requested, and his assertion that, if the land is subject to the mineral leasing laws, appellant could obtain a lease of the sand and gravel deposit, even if his mining claim should be set aside (Br. 27–28), are based on the erroneous assumption that a sand and gravel lease might be obtained under the mineral leasing laws. On the contrary, those laws apply only to "deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas." The Act of Feb. 25, 1920, c. 85, sec. 1, 41 Stat. 437, as amended, 30 U. S. C. 181.

Appellant's argument (Br. 29–32) that the Secretary of Agriculture had no power to issue permits for development of mineral resources prior to the enactment of 48 U. S. C. sec. 341, ignores the authority vested in him by 16

U. S. C. sec. 492, "to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska." His assertion that the Government is developing "a mine," and his argument based thereon relating to the general development of mineral resources that may exist in national forests, is beside the point here. The present case represents simply the use of sand and gravel for road building purposes, and not the general exploitation of mineral resources that may exist in national forests.[7]

The cases relied upon by appellant do not sustain his contention that the 37.5 acre tract of land was not appropriated until Public Land Order 734 was published in the Federal Register (Br. 16–25), since there was no such withdrawal of land under a statutory authority in those cases as exists in the present case. His argument (Br. 21) based upon the language in Regulation U–3, (R. 92) to the effect that the withdrawal would not be effective until published in Federal Register is immaterial here, since that

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[7] We are not relying, as appellant contends (Br. 37-38), on the Act of Nov. 9, 1921, c. 119, sec. 17, 42 Stat. 216, 23 U. S. C. 18, as an independent ground for authorization in the instant case. That statute, which authorizes the transfer of lands "as a source of materials for the construction or maintenance of" highways, is certainly indicative of the congressional policy that road materials should be made available to governmental organizations which are constructing highways in the vicinity of public lands or reservations of the United States.

regulation is addressed only to withdrawals for recreation areas, not withdrawals for use of road materials.[8]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be affirmed.

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May 1953.

[8] The court did not base his decision on the theory urged in paragraph IV of the complaint (R. 4) of a withdrawal of 91.13 acres of land as a public service site. The regulations and rulings which were excluded by the trial court (Br. 42–45) are in fact printed in the record (R. 75–93) but do not help appellant for the reasons already stated herein.

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No. 13685

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

REPLY BRIEF

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FRAYN PRINTING COMPANY

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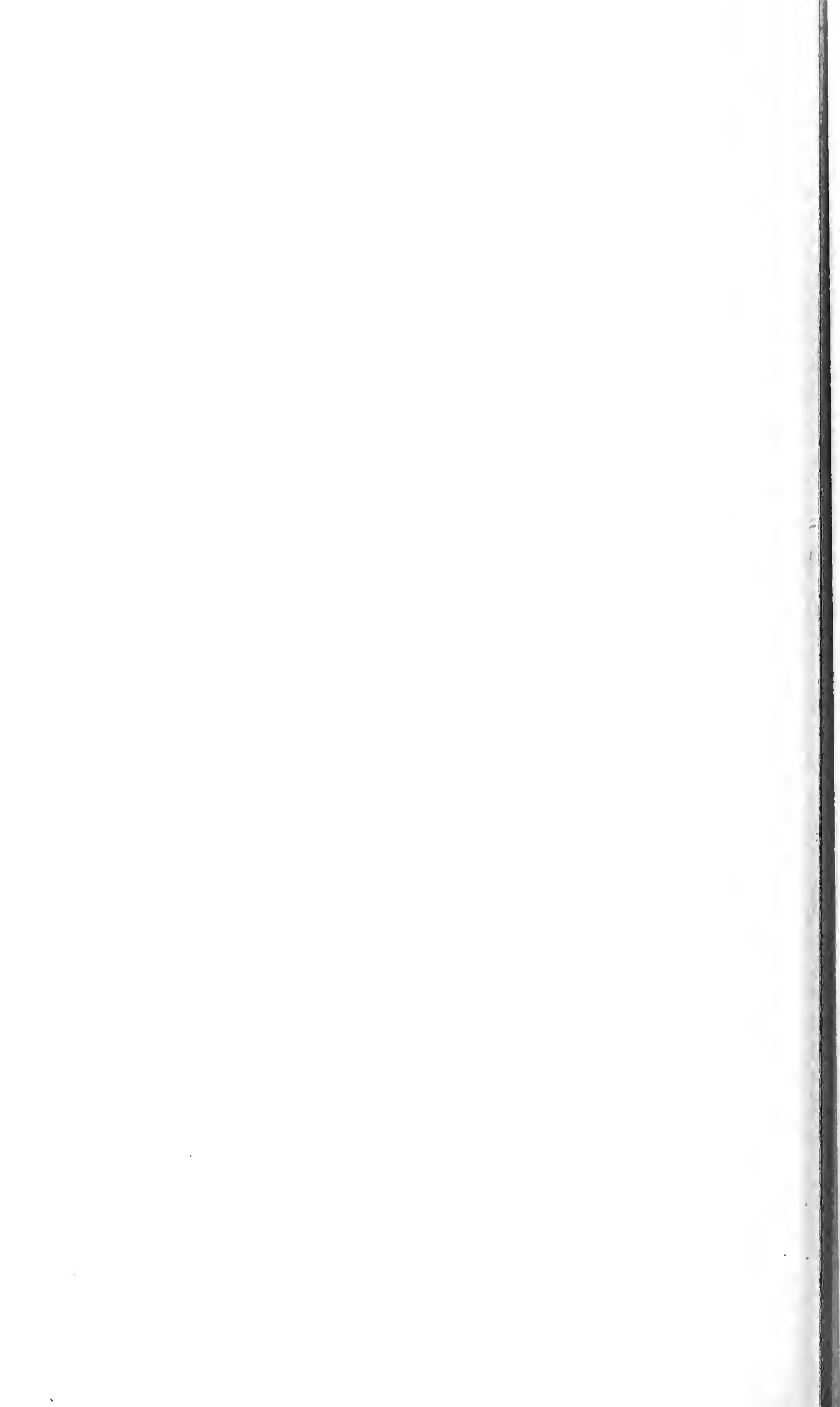

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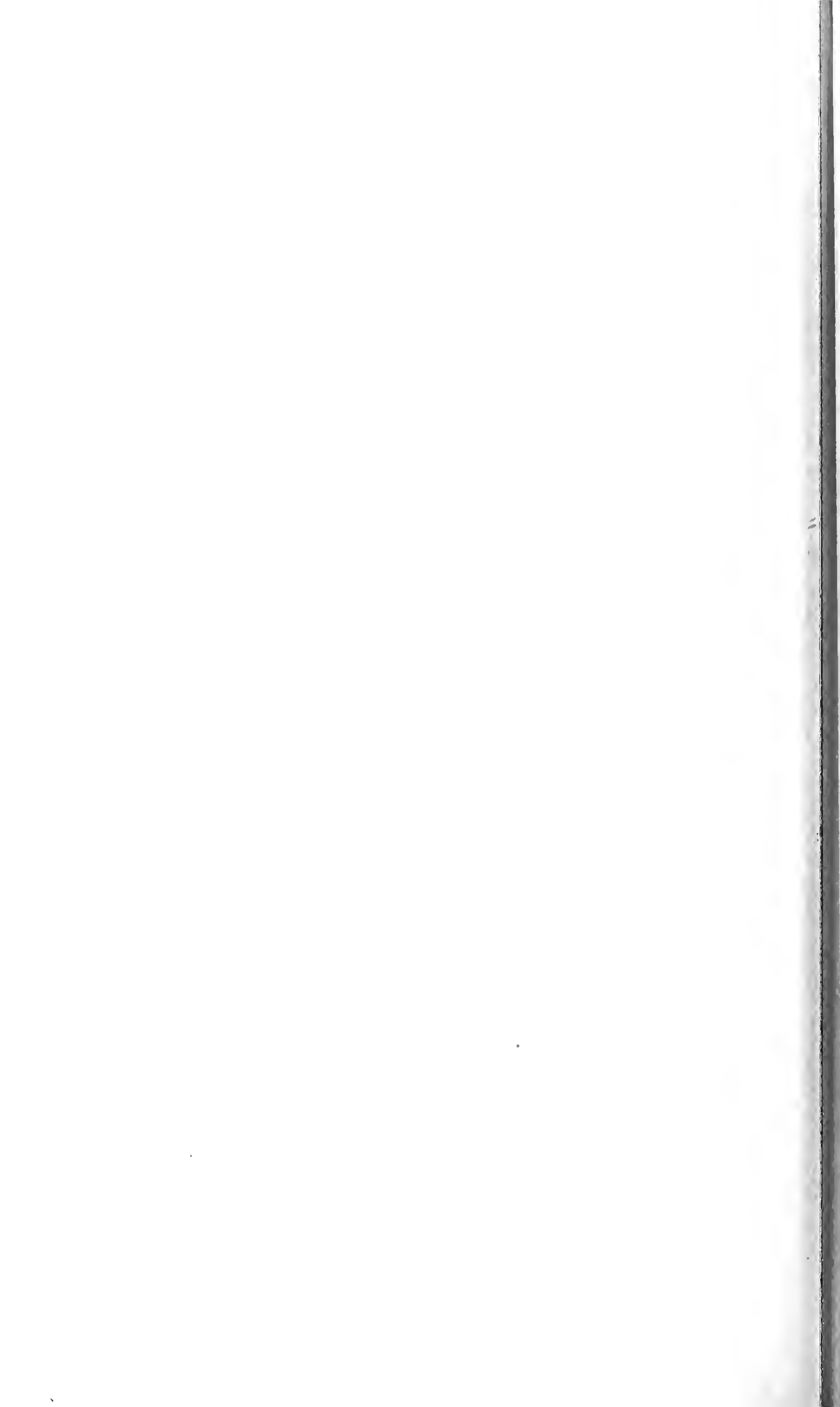

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IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

H. F. SCHAUB, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	**No. 13685**

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA FIRST DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

APPELLANT'S REPLY BRIEF

Appellee's statement of the facts is incorrect in a number of particulars. Appellee assumes that the gravel was discovered and developed by the Government and that plaintiff seeks to take the benefits of this development.

It has been shown that the road and log-loading range were constructed by private contractors at their own expense and for their own purposes (App. B. 13-14, 41). There was not an iota of evidence that the actual area of use along the stream constituted

development of the property. It appears that no two contractors worked in the same area, probably because after gravel was taken out there were "roots showing" (Tr. 175) and "some debris" (Tr. 204) comes down the stream with every freshet, thereby fouling the area. It appears that the contract let after appellant filed his mining location contemplates opening up a new area of 8 or 9 acres (Tr. 255). It is nowhere explained how past work in the area is a valuable development by the government of which appellant seeks to take advantage while at the same time the government is abandoning the so-called developed area.

Again, appellee seeks to show that the Whipple Creek area was the only source of gravel for the roadway. As normal procedure a rock crusher may be used and will produce a superior surfacing material (Tr. 315). Indeed, appellant prior to the time the contract was awarded, had been advised by one of the bidders that it would use a rock crusher (Tr. 311-313, record incorrectly uses the word "pressure" for "crusher").

In appellant's sand and gravel business it is necessary to have up to 40% of sand or fine aggregates for production of concrete products (Tr. 315), but these fine materials are not necessary for road surfacing and cannot be produced with a rock crusher (Tr. 314). Appellee confuses the need of "sand and

gravel aggregates for Ketchikan" (App. B. p. 11) with the single requirement of coarse gravel or crushed rock for road surfacing. The former is what gives the deposit value as a mine. Gravel useful only for road surfacing in the Ketchikan area probably would not sustain a mineral location since it could not be extracted and marketed at a profit in competition with the more economical method of producing a superior product through use of a rock crusher.

APPELLEE'S ARGUMENT

I.

Public Land Order 734 Did Not "Relate Back"

Nowhere does appellee cite a single case, rule or regulation justifying the lower court's ruling that Public Land Order 734 "related back" to invalidate appellant's earlier location. Appellee has not even offered a countering argument to that set out at pages 16-25 of appellant's brief. It must be assumed that appellee concedes the lower court erred upon this issue, and that there is no authority contrary to that cited by appellant.

II.

Correction Memorandum No. 11 Was Not a Special Use Permit Under 48 U.S.C. § 341.

While the lower court refers to the correction

memorandum as a special use permit throughout its opinion, no one else ever referred to it as such before or at the trial. While appellant believes that it has shown the memorandum could not have been such a permit the fact is that no one urged it to be such at the trial because the government disclaimed its intention to rely upon that statute (App. B. pp. 35-37). Indeed, when questions were asked concerning other correction memoranda the government objected (Tr. 208). Thus, appellant was deprived of his opportunity to prove:

1. That Correction memoranda one through ten were not and could not have been issued under 48 U.S.C. § 341;

2. That there are special regulations governing issuance of permits under that statute, and Correction Memorandum No. 11 does not meet those requirements;

3. That regulations require publication of such a permit and/or recording in the local land office and/or posting upon the ground; and

4. That correction memoranda are prescribed for internal office procedure as a preliminary to issuance of a special use permit, or for the purpose of correcting maps or applying for land order withdrawals.

Because evidence is lacking, appellee theorizes as

to the facts. Thus, it asserts that withdrawal by Public Land Order was necessary to make the withdrawal perpetual and not limited to thirty years. First, a withdrawal by public land order is not perpetual and may be revoked at any time, 38 Stat. 113, 43 U.S.C. §§ 151, 152. Second, there was not the slightest evidence that the government would require use of the land for more than thirty years or that if it did another permit could not then be issued. Third, there is no evidence whatsoever that indicates anyone had such purpose in mind.

Certainly, no "sound business practice" required withdrawal by the Secretary of the Interior. Congress provided for a complete and unequivocal withdrawal by issuance of a special use permit. The statutes authorizing a public land order withdrawal, 36 Stat. 847, 37 Stat. 497, 43 U.S.C. §§ 141, 142, provide that even after such a withdrawal the lands "shall at all times be open to exploration, occupation and purchase under the mining laws of the United States so far as the same apply to metaliferous minerals." Thus, litigation, whatever its result might be, could arise out of a withdrawal by public land order where none could arise out of a special use permit under 48 U.S.C. § 341.

Again, appellee argues that there is no inconsistency between a permit and a public land order with regard to application of the mineral leasing laws

and appears to take the position that the land is subject to such laws. If the land may be leased then there could be no special use permit. The statute provides that lands covered by such a permit after its issuance *"shall not be subject * * * to disposition under the mineral leasing laws."* (48 U.S.C. § 341). The Secretary of Agriculture has no discretion to issue a permit and subject the lands to the mineral leasing laws. If land is valuable for its minerals it should be developed under the mining or mineral leasing laws. If, on the other hand, the Secretary of Agriculture determines that the land should be developed for some other purpose, then it should be developed for that purpose free from any possibility of interference by virtue of the mining and mineral leasing laws.

Appellee is in error in asserting that no lease of the mineral deposits could be made by the Secretary of Agriculture. 30 U.S.C. §§ 274 and 284 both provide for leasing of "coal and other minerals."

Appellee has likewise made no showing that there was any publicity at all in connection with issuance of Correction Memorandum No. 11.

Wolsey v. Chapman, 101 U.S. 755, involved a presidential proclamation and directions from the Secretary of the Interior to local land officers, *United States v. Midwest Oil Co.,* 236 U.S. 459, dealt with a presidential proclamation, and *United States v.*

Payne, 8 Fed. 833, determined that lands had been reserved by treaty because a treaty was equivalent to an act of Congress. None of appellee's cases concerned a purported withdrawal by a regional forester. Forest Service regulations require that withdrawals by public land order be published in the Federal Register (Tr. 92) and that recreation areas

> "* * * be posted at frequent intervals along the boundary of the area and at prominent places within the area, such as along routes of travel." (Tr. 91).

If actual posting on the ground is required for classification of a recreation area—which does not withdraw the land from mineral entry—how can it be conceived that a permit withdrawing land need not be either published or posted. In this case, no prospector could determine that the area had been withdrawn either by examining the ground or the land records of the local recording precinct.

Finally, appellee cites no authority whatsoever that a special permit may be issued *by* the government *to* the government. If the effect of Correction Memorandum No. 11 was merely to "take the property out of the control of one and lodge it in the control of another set of government officials, while the title remained in the same status as it had been before," as appellee asserts, then it would not be authorized under 48 U.S.C. § 341. Withdrawal by public land order was a well established procedure for

accomplishing that purpose. Congress could not have intended merely to provide an alternative method of withdrawal where the first was adequate for such purpose. The purpose of the statute was to allow for the development of Alaska "commercially and industrially" not to extend the carefully restricted executive power of withdrawal. It was intended to "broaden and make more practicable" existing authority of the Secretary of Agriculture, not to extend to him the hitherto unavailable power of withdrawal (Sen. Rep. 899, 80th Cong. 1st Sess).

III.

There Was No Actual Use or Possession Constituting an Authorized Withdrawal of Any Area.

Appellee devotes the major portion of his brief to the withdrawal of the three-acre tract. While this area is of little practical importance to either appellant or appellee, the argument is erroneous. It assumes that the use of the land prior to the time of appellant's location was possession of a character to withdraw the land. *Scott v. Carew,* 196 U.S. 100, cited by appellee, quoted and approved the rules of *U.S. v. Fitzgerald,* 15 Pet. 407, that authorized withdrawals do not "relate back" and that actual occupation of lands by direction of subordinate officers of the government does not withdraw land. *Scott v. Carew* also approved *U.S. v. Tichenor,* 12 Fed. 415,

but held that there was a withdrawal in the case under consideration because it had been proved that the occupation of particular lands was at the direction of the head of an executive department and was to be permanent. The court quoted war department orders to the officer in charge, directing him to "establish a military post."

In this case all of the evidence shows that each use of the tract was temporary and intended to be such. It does not appear that any government officer, even as high as the regional forester, ever directed that there be any use or occupation of the area—and certainly not permanent occupation.

Some gravel was removed in 1934 (Tr. 124). In 1942 the Forest Service consented to the removal of three or four hundred yards of gravel by the Coast Guard (Tr. 129). During 1948 a contractor removed 15,269 yards (Tr. 131). Other contractors removed 6,654 yards in 1949 and 8,215 yards in 1950 (Tr. 135). During 1949 a contractor removed about 1,000 yards of material for driveways under verbal permission to make free use of it (Tr. 162). These uses were clearly permissive and were use and occupation by independent contractors, not by servants or agents of the government. Indeed, the removal of material by contractors appears to have been in violation of Regulation U-11 (J) (Tr. 165, Pl. Ex. 2, Tr. 109, 118). That regulation prohibits a free use

permit to contractors where the contractor is required to furnish all materials as was the case with the contracts here (Tr. 166). This breach of regulations clearly shows that the use could not have been authorized by the Secretary of Agriculture and was not pursuant to his directions to use the area permanently. The Forest Service iteslf has never removed any gravel from defendant's claim with its own equipment and its own employees (Tr. 130).

If appellee had intended its use to be a withdrawal it had seventeen years from the first such use in 1934 to perfect it; yet it failed to do so. Actually the request for withdrawal ultimately acted upon was made by letter of the Bureau of Public Roads about January 31, 1951 (Tr. 137-138), and this was at a time after the last use of the premises in December of 1950 (Tr. 135). There never was any use contemporaneous with an intention to withdraw the lands.

The issue is not, as appellee assumes, whether or not the government abandoned possession, but whether it ever had the concurrence of possession and a direction to occupy by an executive officer of the government sufficient to withdraw the land from entry. Thus, assuming there was an actual withdrawal by possession, appellee argues there was no abandonment, citing cases far removed from the present case. *United States v. Fullard Leo,* 331 U.S.

256, held that the plaintiff should prevail on his claim to Palmyra Island on the theory of a lost grant from the Kingdom of Hawaii; *Equitable Life A.S. v. Mercantile-Commerce B & T Co.,* 155 F.(2d) 776, concerned a defense by an insurance company that the insured "had abandoned and relinquished his rights to benefits"; *Helvering v. Jones,* 120 F.(2d) 828, held that a taxpayer had failed to show an "abandonment loss" under the internal revenue code; and *In re Stillwell,* 120 F.(2d) 194, held that the evidence did not justify dismissal of the bankruptcy debtor's petition for discharge on the ground of "abandonment."

Finally, appellee mistakenly asserts that had the government been a private locator, appellant's entry would be invalid. No cases are cited and indeed could not be because the authority is to the contrary:

> "* * * the mere occupany of unpatented mining ground and even work being done thereon by the one in possession in the absence of a previous location of the ground, is not sufficient to prevent its relocation by a qualified locator provided that the location is made peaceably and without force." *Oliver v. Burg,* 58 P.(2d) 245 (Ore. 1936).

Kramer v. Gladding McBean & Co., 85 P.(2d) 552 (Cal.), held and *Oregon King Min. Co. v. Brown,* 119 Fed. 48 (CCA 9th), assumed that a relocator may adopt an earlier location "particularly if the evi-

dence of such discovery is apparent to the sight of the relocator."

The lower court specifically found that appellant located his claim "openly and peaceably" (Finding IV, Tr. 59).

Actually no act of the government can be equated to those required of a mineral locator—there was no posting of either discovery, corner or boundary notices on the ground, no clearing of boundary lines, and no actual possession at all at the time appellant made his location, and no one had been in actual possession for six months prior to the location. Alaska Compiled Laws 47-3-33 provides that a claim is open to relocation ninety days after discovery, unless there is compliance with the recording requirements.

CONCLUSION

Appellant respectfully submits that appellee has shown no basis whatsoever for sustaining the lower court's decision that (1) Public Land Order 734 "related back," and (2) that Correction Memorandum No. 11 was a special use permit when that issue was not litigated and the evidence clearly shows it was not intended as and could not legally be such a permit.

Respectfully submitted,

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No. 13690

United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

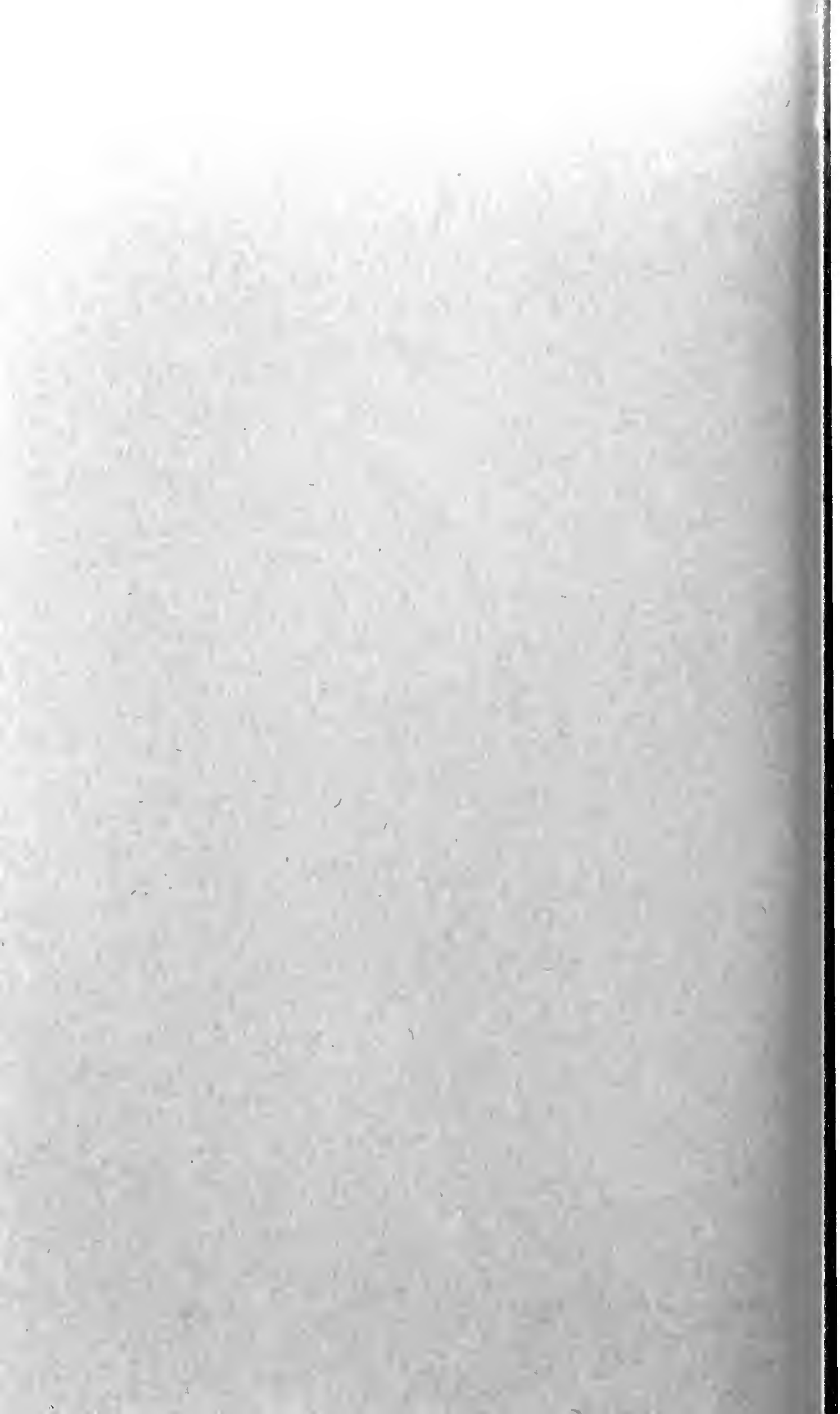
Respondents.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.



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Petitioner,

vs.

ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

Respondents.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-B

Form NLRB-501 (12-49)

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 21-CA-1022. Date filed 2/1/51. Compliance Status Checked By: D. B.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer Against Whom Charge Is Brought: Nemec Combustion Engineers, 2430 West Whittier Boulevard, Whittier, California.

Number of Workers Employed: Approximately 177.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and 8(a)(3); 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are unfair labor prac-

tices affecting commerce within the meaning of the act.

2. Basis of the Charge:

That the Employer discharged employees Thomas Frederick and Clarence Leeper on or about December 28, 1950, upon the grounds that these employees were engaging in union organizational activities for the purpose of discouraging the formation of the Union.

That on January 23, 1950, the date of a Board conducted representation election, representatives of Management went through the plant telling each employee that if the U.A.W.-A.F.L. was defeated the Company would grant a blanket wage increase effective at 6:00 P.M.; that after the election a notice was immediately posted announcing the wage increase and other benefits; that the representatives of the Company known to have engaged in these activities were Mr. Fred Nemec, Mr. Elwood C. Martin and a foreman known as "Wimpy"; that an employee Mr. George Breakbill was paid added hourly compensation to help defeat the Union.

That the foregoing activities were wilfully and deliberately conducted for the purpose of discouraging the organization of the Union and interfering with the conduct and result of the representation election, and refusing to bargain, all in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

3. Full name of labor organization, including local name and number, or person filing charge: In-

ternational Union, United Automobile Workers of America, A. F. of L.

4. Address: 6308 Pacific Boulevard, Huntington Park, California.

* * * * *

6. Address of National or International, if any: Send copies of all documents to: Gilbert, Nissen & Irvin, 117 West Ninth Street, Los Angeles 15, California. Telephone No. TUcker 9266.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

GILBERT, NISSEN & IRVIN,
/s/ By WILLIAM B. IRVIN,
Attorneys for U.A.W.-A.F.L.

Date: January 31, 1951.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1022

In the Matter of
ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS

and

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, AFL.

COMPLAINT

It having been charged by International Union, United Automobile Workers of America, AFL, hereinafter called the Union, that Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a copartnership doing business as Nemec Combustion Engineers, hereinafter called the Respondent, has engaged in and is engaging in unfair labor practices affecting commerce as defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act; the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, Section 102.15,

hereby issues this Complaint and alleges as follows:

1. Respondent is and at all times material herein was engaged in the manufacture of combustion equipment and job and contract machine work at its place of business in the City of Los Angeles, County of Los Angeles, State of California.

2. Respondent, in the course and conduct of its business as aforesaid, causes and continuously has caused large quantities and valuable amounts of materials, equipment and supplies used by it in the conduct of its business to be transported from and through states of the United States other than the State of California. During the 12-month period ending September 30, 1950, Respondent produced and sold products of a dollar value approximating $295,000, of which approximately 25 per cent in value was caused by it to be transported in interstate commerce from its place of business in Los Angeles, California, to, into and through states of the United States other than the State of California.

3. Respondent is and at all times material herein was engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

4. The Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. Respondent did discharge Thomas Frederick on or about December 27, 1950, and did discharge Clarence Leeper on or about December 28, 1950, and at all times since said dates has refused and failed and does now refuse and fail to reemploy them for the reason that they engaged in concerted activities

with other employees for the purposes of collective bargaining and other mutual aid and protection.

6. Respondent, while engaged in its business as described in paragraphs 1 and 2 above, on about January 21, 1950, and at all times thereafter, interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act by various acts and statements, including without limitation the following:

(a) Attempting to influence its employees against the Union.

(b) Promising and granting benefits in the event its employees would forsake the Union.

7. By the acts set forth in paragraph 5 above, Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

8. By the acts and conduct set forth and described in paragraphs 5 and 6 above, and by each of said acts, Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, and Respondent did thereby engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

9. The activities of Respondent as set forth in paragraphs 5 and 6 above, and each of them, occurring in connection with the operation of Respondent described in paragraphs 1 and 2 above, have a close, intimate and substantial relationship to trade, traffic, and commerce among the several states of the

United States, and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

10. The aforesaid acts of Respondent, as set forth in paragraphs 5 and 6 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the Board on behalf of the Board, by the Regional Director for the Twenty-First Region, on this 14th day of November, 1951, issues this Complaint against Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership doing business as Nemec Combustion Engineers, Respondents herein.

[Seal] /s/ HOWARD F. LeBARON,
Regional Director National Labor Relations Board
Twenty-First Region.

GENERAL COUNSEL'S EXHIBIT No. 1-F

[Title of Board and Cause.]

ANSWER OF RESPONDENT

Comes Now Respondent Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a copartnership doing business as Nemec Combustion Engineers, and in answer to the complaint on file in the above entitled matter, admits, denies and alleges, as follows:

1. In answer to Paragraph 1 of said complaint

Respondent admits all the allegations therein contained, except that Respondent denies that its place of business is in the City of Los Angeles, County of Los Angeles, State of California, and in this respect Respondent alleges that its place of business is in the City of Whittier, County of Los Angeles, State of California.

2. In answer to Paragraph 2 of said complaint Respondent admits the allegations therein contained.

3. In answer to Paragraph 3 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein contained except Respondent admits that Respondent is and at all times material in said complaint was engaged in commerce within the meaning of Section subsection (6) of the Act.

4. In answer to Paragraph 4 of said complaint Respondent having no information and belief upon the subject mentioned in said Paragraph 4 of said complaint sufficient to enable Respondent to answer any of the allegations therein contained and placing Respondent's denial on that ground, Respondent denies each and every allegation set forth in said Paragraph 4.

5. In answer to Paragraph 5 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein contained except Respondent admits that it did discharge Thomas Frederick on or about December 27, 1950.

In this respect Respondent alleges the facts to

be that the work of said Thomas Frederick was not satisfactory in that said Thomas Frederick loafed at his work, refused to follow directions and instructions and broke tooling and other materials, refused to perform work assigned to him; that said work performed by said Thomas Frederick was not proper and was not satisfactory to Respondent; that said Thomas Frederick was discharged for cause.

In respect to said Clarence Leeper, Respondent alleges the fact to be that the said Clarence Leeper is now deceased, having died before the filing of the complaint herein, and that said Clarence Leeper on or about December 28, 1950, quit his job and position and employment with Respondent on his own free will and volition, and informed Respondent that he was quitting because Respondent refused to pay him for time that he had previously spent while eating his meals.

6. In answer to Paragraph 6 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein contained.

7. In answer to Paragraph 7 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein set forth. Respondent specifically denies that it did engage in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act, and specifically denies that Respondent is engaging in unfair labor practices within the meaning of Section 8 (a), subsection (3) of the Act.

8. In answer to Paragraph 8 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein contained. Respondent specifically denies that Respondent has interfered with, restrained and coerced, and Respondent specifically denies that Respondent is interfering with, restraining and coercing its employees, in the exercise of the rights guaranteed them by Section 7 of the Act, and Respondent specifically denies that Respondent did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a), subsection (1) of the Act.

9. In answer to Paragraph 9 of said complaint Respondent denies the same generally and specifically denies each and every allegation therein contained.

10. In answer to Paragraph 10 of said complaint Respondent denies the same and generally and specifically denies each and every allegation therein contained.

11. In respect to the charges attached to said complaint Respondent denies the same, and specifically denies each and every allegation set forth in said charges.

As a Separate and First Affirmative Defense Respondent Alleges:

1. That said Clarence Leeper, the person set forth in Paragraph 5 of said complaint, is now dead, having died prior to the filing of the complaint herein, and that by reason thereof this Board

has no jurisdiction with respect to said decedent.

Wherefore, Respondent prays that this complaint be dismissed.

Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a Co-Partnership, d/b/a Nemec Combustion Engineers,

/s/ By FRED A. NEMEC, Co-Partner, Respondent.

Duly Verified.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Daniel J. Harrington, for the General Counsel. Messrs. J. E. Simpson and R. D. Sweeney, of Los Angeles, Calif., for the Respondent. Mr. William Pounds, of Huntington Park, Calif., for the Union.

Before: Wallace E. Royster, Trial Examiner.

Statement of the Case

Upon a charge duly filed by International Union, United Automobile Workers of America, AFL, herein called the Union, the General Counsel of the National Labor Relations Board, herein called, respectively, the General Counsel and the Board, issued a complaint dated November 14, 1951, against the three copartners named in the caption, herein called the Respondents, alleging that the Respond-

ents had, in violation of Section 8 (a) (1) and (3) of the Act, discharged Thomas Frederick and Clarence Leeper because they engaged in concerted activities for purposes of collective bargaining and other mutual aid and protection, and, in violation of Section 8 (a) (1) of the Act, attempted to influence employees against the Union by promising and granting benefits in the event employees would forsake the Union. Copies of the charge, the complaint, and a notice of hearing were duly served upon all parties.

Respondents' answer admits the jurisdictional allegations of the complaint, denies the commission of unfair labor practices, asserts that Thomas Frederick was discharged because his work was not satisfactory, and that Clarence Leeper voluntarily quit his employment. The answer further asserts that because of the intervening death of Clarence Leeper, the complaint as to him should be dismissed.

Pursuant to notice, a hearing was held at Los Angeles, California, on January 21 and 22, 1952, before the undersigned Trial Examiner. All parties were represented, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the conclusion of the General Counsel's case-in-chief, I granted a motion by Respondents' counsel to dismiss that portion of the complaint which alleged an independent violation of Section 8 (a) (1) and denied such a motion with respect to Thomas Frederick and Clarence Leeper. All parties

were granted to February 6, 1952, for the purpose of submitting briefs to the Trial Examiner. None has been received.

Upon the entire record in the case and upon my observation of the witnesses, I make the following:

Findings of Fact

I. The business of Respondents

The Respondents, a copartnership, are engaged in the manufacture of combustion equipment and in job and contract machine work in Los Angeles, California. During the 12-month period ending September 30, 1950, Respondents produced and sold products having a value of approximately $295,000, of which about 25 percent in value was transported from Respondents' place of business in Los Angeles to, into, and through states of the United States other than the State of California.

II. The organization involved

International Union, United Automobile Workers of America, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of Respondents.

III. The unfair labor practices

In the fall of 1950, the Union manifested an interest in organizing Respondents' employees who, at that time, were not represented. On December 27, 1950, William Smith, a representative of the Union, met with Thomas Frederick and gave Frederick 100 authorization cards to distribute. The next day,

Frederick returned 55 of the cards with signatures upon them. At the close of his shift on that date, Frederick was discharged.

On the evening of December 27, the welders working the night shift, approached the night superintendent and spoke to him about securing a bonus for night work and payment for their lunch hour. Clarence Leeper acted as spokesman for the employees. The superintendent explained to them that these were matters that must be taken up with one of the partners and, at the suggestion of someone, Fred Nemec, a partner, active in the management of Respondents' business, came to the shop and met with the welders. Nemec testified that he learned from the superintendent that the welders were in an "uproar" so he went over to investigate the difficulty. Leeper told him on this occasion, Nemec testified, that he wanted a showdown on lunch-hour pay and that if it was not granted, the men would walk out. At this point, according to Nemec, one of the welders told Leeper that he was speaking for himself. Leeper went on to say that he had attempted to secure an arrangement for lunch-hour pay and night bonus with Foreman Gilly and Elwood Martin, without success, and that if such retroactive payment was not arranged for, he would quit. Another employee at this point, according to Nemec, announced that he was quitting immediately and was given his check and left the plant. Still another said that he would not "string along" with Leeper. Finally, Leeper said that he would give the Company

24 hours to reach a decision. Leeper finished his shift and left the plant.

On the following day, December 28, about an hour before shift time, Nemec appeared at Leeper's house and asked to speak to him. Discovering that Leeper had already left for the plant, he offered a check, in payment of Leeper's services to date, to Mrs. Leeper, explaining that Leeper had quit. When Mrs. Leeper expressed some puzzlement about that development, Nemec explained, as he candidly testified, that Leeper had given Respondents an ultimatum which they could not meet and had the welding shop in an uproar. Nemec said that Leeper was one of his best welders and he disliked very much to see him go, but in consideration of the trouble he had caused, he could not be put back to work. Leeper appeared at the plant on that afternoon, but did not go to work. On December 29, Leeper telephoned to inquire why he was not permitted to return to work, and on January 2 had a conversation with Nemec about it. On the latter occasion, Leeper waived any demand for retroactive back pay if he were returned to his job. Nemec refused to rehire him.

Frederick began work for the Respondents in 1946 and except for one or two short periods, during which he was laid off for economic reasons, remained at his employment until his discharge on December 28, 1950. In February 1950, Frederick entered a school and thereafter, by arrangement with the Respondents, worked an average of 30 hours a week.

According to Frederick, he became interested in

the Union in October 1950, and spoke to other employees about it. On December 27 and 28, he handed out Union designation cards in the plant which 55 employees signed. Frederick testified that Foreman Gilly saw him do this and that he jokingly asked Gilly to sign one. At the end of his shift on December 28, Frederick was told by Gilly that Nemec had complained about Frederick's laxity in keeping his machine clean, and that Frederick was, for this reason, discharged. Frederick protested that it was not his job to clean machines and suggested that his activity in behalf of the Union may have been the reason for the discharge. According to Frederick, Gilly said that he knew nothing of it, except that he had received instruction from Nemec to let Frederick go.

Gilly testified that he had supervised Frederick's work since the latter first was employed by the Respondents. For the first year, according to Gilly, Frederick machined axles and for the ensuing two years, worked intermittently on machining inserts from a carbon bar. Machining carbon, according to Gilly, is a dirty job and in early December, he testified, Frederick said that if he had to work longer on carbon, he would quit. Gilly explained, he testified, that there was nothing else for Frederick to do, and consulted one of the copartners, Elwood Martin, about the situation. Martin told him, Gilly testified, not to discharge Frederick until after the holidays. According to Gilly, Frederick persistently failed to clean the machines on which he worked and he often complained to Frederick about it with-

out achieving any beneficial result. On a date which Gilly placed as December 27, but which other evidence rather clearly shows to have been about a week before that, Frederick was helping to reassemble an automatic machine and with another employee was using a sledge hammer to force a drum onto an axle. Gilly spoke to Frederick and to one Betker, with whom Frederick was working, telling them not to use the sledge hammer. A few minutes later, according to Gilly, he discovered that they were still using the sledge and on this occasion, Gilly told them to use a wooden block to take the impact of the blows.

On December 28, according to Gilly, he directed Frederick to drill holes in a toolholder and to insert a screw there to keep the toolholder firmly in place. Instead, Gilly testified, Frederick tightened a collar to such an extent that the casting on the toolholder was broken. Gilly gave Frederick a "slight bawling out," he testified, and reported the matter to Martin, asking for permission to discharge Frederick. Martin told him to use his own judgment. Gilly then had Frederick's check prepared and gave it to him at quitting time, telling Frederick that his discharge was due to his failure to keep machines clean. Gilly admitted that Frederick may have offered him a Union designation card for signature, but denied being aware that Frederick was engaged in any sort of union activity, or that anything of that nature affected his decision to discharge him.

On cross-examination, Gilly admitted that it was either in 1948 or before that he spoke to Frederick

about keeping machine clean. Elwood Martin testified that Gilly reported to him concerning Frederick on more than one occasion and that Gilly said Frederick was not working out satisfactorily, that he lacked a spirit of cooperation and appeared to be uninterested in his job. According to Martin, when Gilly complained that Frederick refused to work on carbon and said that Frederick was not qualified to put on another job, Martin answered that it would be bad policy to lay him off just before Christmas and instructed Gilly to keep him busy until after the holidays. Still, according to Martin, about December 21, Gilly complained that Frederick had used a sledge hammer on a machine and on December 28 that he had disregarded instructions in repair work and had thereby broken a toolholder. Martin then gave Gilly the permission he requested, to discharge Frederick. Martin denied that union activity was a consideration and asserted that he had no knowledge that Frederick was active in that respect.

I think that it may not be doubted under the evidence that Leeper was discharged. True enough, he had issued what might be termed an ultimatum to the Respondents, and had stated that he would quit if they did not meet his conditions. He seems, however, to have thought better of this strategy after leaving work on the morning of December 28; at least, his return to the plant on that afternoon would seem to indicate so. Rather clearly, Leeper was seeking by means of concerted action of the welders to secure more wages for himself and for

them. The account given by Nemec of his meeting with the welders on the evening of December 27 establishes that they were seeking to act concertedly in a matter affecting their wages, and that Leeper was their spokesman. No doubt it is true, as Nemec testified, that certain individuals in the group refused to go as far as Leeper seems to have desired to lead them. Nonetheless, this was concerted activity and, as such, was protected. Nemec said that Leeper was one of his best welders, that he disliked the circumstances which made it impossible for him longer to retain Leeper as an employee. But what were these circumstances? The record shows only that Leeper made a firm demand for more money and appeared to have the support of some, at least, of the welders in this purpose. Now, perhaps, it is accurate to describe the situation which arose from this action as getting the welders in an "uproar." But, if so, it is such an uproar as an employer must endure so long as the activity which is so described is of a protected nature and kept within lawful bounds. Accepting Nemec's testimony that the welders quit working for a short time on December 27, they had a protected right to do so. It does not appear that anything in the nature of a "sit-down" strike occurred. It does appear, rather, that after voicing a protest by quitting work, they sought to gain concessions from the superintendent and then from Nemec. After a discussion of the matter, the men returned to work without further incident.

Now, Nemec may certainly be pardoned for being disturbed by the conduct of Leeper and may well

have wished that the welders would seek to deal with him individually rather than as a group, but when he refused longer to employ Leeper because of his leadership in the action, he was violating a right secured to Leeper by the Act. I conclude that Leeper's appearance at the plant on or about the usual starting time for his shift, his failure to take his helmet and other tools home with him after he finished work on the morning of the 28th, and his two subsequent attempts on December 29 and January 2 to get back to work for the Respondents, establishes that he did not quit his job. This conclusion is buttressed, to some extent, by the fact that Leeper was paid 4 hours as call-in pay for December 28. According to Nemec, this payment was made because Leeper contended he was inconvenienced by being forced to come to the plant on that day to get his check. Although I regard Nemec generally as a credible witness, I cannot give any substantial weight to this bit of testimony.

I find that by discharging Leeper on December 28, 1950, the Respondents discouraged concerted activity among their employees and thereby violated Section 8 (a) (1) and (3) of the Act.

The case of Frederick is more complex. Nemec, although testifying that he had fault to find with Frederick, due to his failure to clean machines on which he worked, nonetheless was not concerned in the discharge. Gilly, who was, did not impress me as a witness upon whose testimony much reliance could be placed. Only on cross-examination did it develop that the occasions on which he criticized Frederick

for failure to clean machines, occurred at least 2 and perhaps 3 years before the discharge. Furthermore, his testimony that he was not aware of Frederick's activity in soliciting employees to sign union authorization cards was, to say the least, disingenuous. He admitted that Fderedick may have offered him such a card for signature. I believe the record fairly establishes that Frederick was remiss in some of the qualities that an employer would seek in a good workman. It may well have been that he was lax with respect to cleaning machines at one time and it is undenied that he protested a continuation of his assignment cutting carbon. If Gilly, as he testified, was then disposed to let him go, and if Martin, as he testified, had long been dissatisfied with Frederick as an employee, it seems exceedingly strange that this would not have been the occasion to dispense with Frederick's services. According to Gilly, there was little other work that Frederick was capable of doing and his chief value to the Respondents in the late fall of 1950 was as an operator on the carbon-cutting machine. I do not believe that an employee who had proved to be as unsatisfactory as Martin and Gilly said Frederick was, would have been pampered to the extent of permitting him to refuse an assignment if he was not fully capable of working on another.

The incident about the sledge hammer has a ring of unreality about it. It may have been that Frederick and another employee were seeking to drive the drum onto the shaft with blows from a sledge hammer, and that this was not good practice. How-

ever, Gilly's testimony about it is difficult to evaluate. He said that he forbade the use of the sledge hammer and then when he found his order was disregarded, asked Frederick and the other employee at least to use a wooden block to lessen the probability of damage to the machine. I believe that if Gilly had issued a flat instruction not to use the sledge, he would have been sufficiently exercised by the disregard of that instruction to have taken some disciplinary action at the time, rather than weakly asking the employees to use the wood block. Whether Frederick actually was at fault in breaking the toolholder, I consider immaterial. Although the incident of the sledge and the breaking of the toolholder, against a background of generally unsatisfactory work performance, is relied upon by the Respondents to establish the cause of the discharge, this leaves unexplained why Gilly, when he let Frederick go, made reference only to the rather ancient complaint of failing to clean machines.

My conclusion is that when Frederick was discharged, Gilly was hard put to find a plausible reason for it, and that he seized upon the stale complaint of failure to clean machines as a pretext to be offered to Frederick. The evidence as a whole fairly convinces that whatever incident about the sledge and broken toolholder may have been, it played no part in Frederick's discharge. In these days of full employment and serious worker shortage, employees, generally speaking, are not lightly discharged. In the circumstances here presented, I find it completely incredible that a laxness on the

part of Frederick, which the Respondents found annoying 2 or 3 years before the discharge, motivated them in discharging him on December 28. I believe that the Respondents are intelligent enough to accept the fact that employees have a right to form labor organizations and to be represented in matters of collective bargaining. However, this does not mean that they would welcome such a development, and instances happening subsequent to the discharge of Frederick establish that the Respondents earnestly desired that their employees not select a bargaining representative. Certain employees were told that the Company could not pay the union scale of wages and compete successfully in the market; others, that their earnings depended upon production, that the more they produced, the better their opportunity to secure wage increases. That the Respondents would view with disfavor anyone who actively, and perhaps with the appearance of success, was attempting to organize their employees, is completely believable. The Respondents employ approximately 125 workers in the shop. Crediting Frederick, as I do, that he distributed through lieutenants and by his own efforts about 100 cards on December 27 and 28 and received back 55 signed cards, I am convinced that the Respondents were aware of his activity. I believe that this awareness led to his discharge at the end of his shift on December 28.

I find that Thomas Frederick was discharged on December 28, 1950, because of his activity in behalf of the Union, and because he sought to secure the

support of other employees in concerted activities, and that by the discharge the Respondents discouraged membership in a labor organization, discouraged concerted activity among their employees, and thereby violated Section 8 (a) (1) and (3) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondents, set forth in Section III above, occurring in connection with the operations described in Section I above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondents have engaged in certain unfair labor practices, it will be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents have discriminated in regard to the hire and tenure of employment of Clarence Leeper, and, as it appears, that Leeper died on June 10, 1951, it will be recommended that the Respondents make his personal estate[1] whole for any loss of pay he may have suf-

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[1] Presumably, this will be made to his widow and minor child. I do not believe, however, that the Board may order such payment to be made directly to them but only to restore as nearly as possible the status quo.

fered by reason of the discrimination, by payment to it of a sum equal to that which he normally would have earned as wages from the date of his discharge, December 28, 1950, to the date that he became incapacitated for employment, less his net earnings during that period.

With respect to Thomas Frederick, it will be recommended that Respondents offer him full reinstatement to his former or substantially equivalent position and make him whole for any loss of pay he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his discharge, December 28, 1950, to the date of Respondents' offer of reinstatement, less his net earnings during that period. Loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the date of Respondents' discriminatory action to the date, in the case of Frederick, of the offer of reinstatement, and, in the case of Leeper, to the date he became incapable of employment. The quarterly periods, herein called quarters, shall begin with the first day of January, April, July, and October, respectively. Loss of pay shall be determined by deducting from a sum equal to that which each employee would normally have earned for each such quarter or portion thereof, his net earnings, if any, in any other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

It will also be recommended that the Respondents, upon reasonable request, make available to the Board and its agents, all payroll and other records pertinent to analysis of the amounts due as back pay.

The unfair labor practices in which the Respondents have been found to have engaged manifest an attitude of opposition to the basic purposes of the Act and justify an inference that commission of other unfair labor practices may be anticipated. In order to effectuate the guarantees of Section 7 of the Act, it will therefore further be recommended that the Respondents cease and desist from in any manner interfering with, restraining, or coercing their employees in the exercise of rights guaranteed by the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. International Union, United Automobile Workers of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Clarence Leeper and Thomas Frederick, the Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination, Respondents have interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Sec-

tion 7 of the Act, and have thereby engaged in, and are engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a copartnership doing business as Nemec Combustion Engineers, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities among their employees or discouraging membership in International Union, United Automobile Workers of America, AFL, by discriminatorily discharging any of their employees or by discriminating in any other manner in regard to their hire or tenure of employment;

(b) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union, United Automobile Workers of America, AFL, or any other labor organization of their employees, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from

any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as permitted by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to Thomas Frederick immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Thomas Frederick and the estate of Clarence Leeper in the manner set forth in the section entitled "The remedy" for any loss of pay suffered by reason of the Respondents' discrimination;

(c) Upon request, make available to the Board, or its agents, for examination and copying, all pay roll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay and the right of reinstatement under the terms of this recommendation;

(d) Post at their place of business in Whittier, California, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondents or their representative, be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places,

including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by other material; and

(e) Notify the Regional Director for the Twenty-first Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps they have taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order the Respondents notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

Dated this twelfth day of February, 1952.

/s/ WALLACE E. ROYSTER,
Trial Examiner.

APPENDIX A

Notice to All Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage concerted activities among them, or membership in International Union, United Automobile Workers of America, AFL, or in any other labor organization, by discriminatorily dis-

charging, or discriminating in any other manner, in regard to the hire and tenure of employment or any term or condition of employment of our employees.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of the right of self-organization, to form labor organizations, to join or assist International Union, United Automobile Workers of America, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as permitted in Section 8 (a) (3) of the Act.

We will offer Thomas Frederick immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

We will make the estate of Clarence Leeper whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to the hire and tenure of employment or any term or condition of employment against any em-

ployee because of membership in or activity on behalf of any labor organization.

Dated..................

NEMEC COMBUSTION
ENGINEERS,
(Employer.)

By.............................
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT OF THE TRIAL EXAMINER

Now comes the Respondent, Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership doing business as Nemec Combustion Engineers, and excepts and objects to the Intermediate Report filed herein by Trial Examiner Wallace E. Royster to the findings, conclusions, recommendations therein set forth, upon each and all of the following grounds:

1. To that portion of the third paragraph of the Statement of the Case reading as follows: "and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues," for the reason that the Trial Examiner, after dismissing the charge con-

tained in Paragraph 6, proceeded to make findings, conclusions and recommendations based thereon without affording Respondent any opportunity of introducing evidence bearing on said issue which Respondent believed was eliminated from the case by such dismissal.

2. To that portion of the Finding of Fact III, page 3, line 15, for failure of the Examiner to find in accordance with the undisputed evidence that Leeper quit his job and was opposed to the Union.

3. To that portion of Finding of Fact III, page 4, line 29, to page 5, line 15, upon the grounds that said finding that Respondent discharged Leeper for concerted activities among their employees is contrary to the undisputed evidence that Leeper quit his job, was opposed to the Union, and that the Trial Examiner and the Board are without jurisdiction over said charges by reason of the fact that no complaint was issued within six months after December 28, 1950, and that the Complaint which was issued on November 14, 1951, contained new and additional charges not contained in the charges originally filed by the Union, to wit: he was discharged on December 28, 1950, and refused rehiring because he "engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection."

4. To the whole of that portion of Finding III begining at page 5, line 17 of the Intermediate Report and ending with page 6, line 38 thereof, upon the grounds that the said findings with respect to the reason for the discharge of Thomas Frederick are

contrary to the preponderance of the evidence and that the Trial Examiner was without jurisdiction to make any findings with respect thereto by reason of the fact that the said Complaint was not issued within six months after Frederick's discharge and that the Complaint which was issued contained new and different charges with respect to matters occurring more than six months prior to the issuance of said Complaint.

5. To that portion of the last paragraph of Finding III, that Frederick was discharged because of his activity on behalf of the Union because the Complaint as filed does not charge his activity on behalf of the Union as a ground of discharge.

6. To that portion of the last paragraph of Finding III that Frederick was discharged because he sought to secure the support of other employees in concerted activities and that Respondent discouraged membership in a labor organization, discouraged concerted activities among their employees, and thereby violated Section 8(a)(1)(3) of the Act upon the grounds that said findings are contrary to the preponderance of the evidence and are based upon charges filed more than six months after December 28, 1950, and that they are based upon charges which were contained in Paragraph 6 of the Complaint which was dismissed by the Trial Examiner.

7. To the whole of Paragraph IV of the Findings of Fact, page 6, lines 40 to 45.

8. To the first paragraph of Paragraph V under the heading "The remedy," beginning on page 6, line 49, upon the grounds that the proposed recom-

mendation that Respondent cease and desist from certain practices are contrary to the evidence, the law, are without jurisdiction, and not based upon issues tried but upon charges which were dismissed.

9. To the second paragraph of Paragraph V of the Report begininng at page 6, line 54, and ending on page 7, line 5, relative to Clarence Leeper, because said recommendation is made without jurisdiction, is barred by the statute of limitations, is contrary to the undisputed evidence which is that Leeper quit his job, was not engaged in Union activities, but on the contrary was opposed to unions.

10. To the whole of the paragraph contained in Paragraph V of the Report, page 7, line 5, and ending on line 25, relative to Thomas Frederick, upon the grounds that the Examiner was without jurisdiction to make such recommendation and the Board is without jurisdiction to follow the recommendation, that the recommendation is based upon matters occurring more than six months prior to the issuance of the Complaint, they are contrary to the evidence and the law, and in addition thereto the formula provided for computing the loss of pay is improper in that Thomas Frederick was only a part-time employee while the formula recommended is the pay for a full-time employee.

11. To the whole of that part of Paragraph V appearing on page 7, lines 25 to 30, recommending that Respondent make available all pay roll and other records because the Board is without jurisdiction to so order.

12. To that part of Paragraph V appearing on

page 7, lines 30 to 37, to the effect that Respondent engaged in any unfair labor practices or has manifested an attitude of opposition to the basic purposes of the Act, or that there is any proper inference that other or any unfair labor practices may be anticipated, or that it should be ordered to cease or desist from in any manner interfering with, restraining or coercing their employees in the exercise of rights guaranteed by the Act because said recommendation is contrary to the facts, evidence and law, is based upon charges which were dismissed for failure of evidence requiring findings in favor of the Respondent, and are made without jurdisdiction.

13. To the following paragraphs and subparagraphs of the Conclusions of Law:

Conclusions of Law numbered 2, 3, and 4 and to each and every part thereof.

14. To the following numbered recommendations of the Trial Examiner and to each and every part thereof, to wit: 1 (a) and (b), 2 (a), (b), (c), (d), and 4, and to the concluding unnumbered paragraph of said Recommendations.

15. To the ruling of the Trial Examiner sustaining an objection to the questions asked of the witness Thomas Frederick for the purpose of establishing that Frederick was discharged by a subsequent employer for incompetency. Said questions and objections and rulings appear in the Transcript, page 82, line 19 to page 84, line 8.

16. The Respondent reserves the right to file such additional Objections and Exceptions as a further

examination of the record may indicate to be appropriate.

Arguments in support of these Exceptions are contained in the Brief of Respondent filed concurrently herewith.

Respectfully submitted,

ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a copartnership d/b/a NEMEC COMBUSTION ENGINEERS,

Respondent.

By R. D. SWEENEY and
J. E. SIMPSON,
/s/ R. D. SWEENEY,
Its Attorneys.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-1022

In the Matter of
ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, a co-partnership d/b/a NEMEC COMBUSTION ENGINEERS
and
INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, AFL.

DECISION AND ORDER

On February 12, 1952, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices in violation of Sections 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, and recommending that the Respondents cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in an independent violation of Section 8 (a) (1) of the Act and consequently dismissed that portion of the complaint.[1] Thereafter, both the Respondents and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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[1] No exception was taken to the dismissal of the independent 8 (a) (1) charge.

The Board[2] has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications:

1. We agree with the Trial Examiner that the Respondents discriminated against Clarence Leeper by discharging him for engaging in concerted activities protected by Section 7 of the Act. Such a discharge independently violated Section 8 (a) (1) as well as Section 8 (a) (3) of the Act.[3] Whether the discharge be regarded as a violation of Section 8 (a) (1) or of Section 8 (a) (3), we find that the same remedy is necessary to effectuate the policies of the Act.[4]

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[2] Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

[3] See Smith Victory Corporation, 90 NLRB 2089, 2101, 2104, enforced 190 F. 2d 56 (C.A. 2).

[4] The General Counsel's request that the back pay due Clarence Leeper be paid to his widow instead of to his personal representative is denied. There is no requirement, nor is it desirable, to litigate the claims of possible heirs to Leeper's estate. Further, the Board is of the opinion that the policies of the Act can best be effectuated by payment to the estate for distribution in accordance with the laws of the State having jurisdiction. See N.L.R.B. vs. Hearst, 102 F. 2d. 658 (C.A. 9).

2. We also agree with the Trial Examiner's finding that the Respondent discriminatorily discharged Thomas Frederick on December 28, 1950, in violation of Section 8 (a) (3) and (1) of the Act. The fact that Frederick was discharged on the same day as Leeper lends further support to the correctness of the Trial Examiner's finding.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership d/b/a Nemec Combustion Engineers, Whittier, California, and their agents, officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging concerted activities among their employees or discouraging membership in International Union, United Automobile Workers of America, AFL, by discriminatorily discharging any of their employees or discriminating in any other manner in regard to their hire or tenure of employment;

(b) In any manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Union, United Automobile Workers of America, AFL, or any other labor organization of their employees, to bargain col-

lectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Thomas Frederick immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(b) Make whole Thomas Frederick and the estate of Clarence Leeper in the manner set forth in the section of the Intermediate Report entitled "The remedy" for any loss of pay they may have suffered by reason of the Respondents' discrimination against them;

(c) Upon request, make available to the Board, or its agents, for examination and copying, all pay roll records, Social Security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay and the right of reinstatement;

(d) Post at their place of business in Whittier, California, copies of the notice attached to the In-

termediate Report and Marked "Appendix A."[5] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondents or their representative, be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by other material; and

(e) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Decision and Order, what steps they have taken to comply herewith.

Signed at Washington, D. C., September 11, 1952.

PAUL M. HERZOG, Chairman,
PAUL L. STYLES, Member,
IVAR H. PETERSON, Member,
[Seal] NATIONAL LABOR RELATIONS BOARD.

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[5] This notice, however, shall be, and it hereby is, amended by striking from line 3 thereof the words "The Recommendations of a Trial Examiner" and substituting in lieu thereof the words "A Decision and Order." In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.87, Rules and Regulations of the National Labor Relations Board—Series 6, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership d/b/a Nemec Combustion Engineers and International Union, United Automobile Workers of America, AFL," the same being known as Case No. 21-CA-1022 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Order designating Wallace E. Royster, Trial Examiner for the National Labor Relations Board, dated January 21, 1952.

(2) Stenographic transcript of testimony taken before Trial Examiner Royster, on January 21 and 22, 1952, together with all exhibits introduced in evidence.

(3) Copy of Trial Examiner Royster's Intermediate Report, dated February 12, 1952 (annexed to item (8) hereof); order transferring case to the Board dated February 12, 1952, together with affidavit of service and United States Post Office return receipts thereof.

(4) Respondents' telegram, dated February 25, 1952, requesting extension of time to file exceptions.

(5) Copy of Board's telegram, dated February 26, 1952, granting all parties extension of time to file exceptions.

(6) General Counsel's exceptions to the Intermediate Report, received March 26, 1952.

(7) Respondents' exceptions to the Intermediate Report, received March 26, 1952.

(8) Copy of Decision and Order issued by the National Labor Relations Board on September 11, 1952, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto

set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this sixteenth day of January, 1953.

/s/ OGDEN W. FIELDS,
Executive Secretary,

[Seal] NATIONAL LABOR RELATIONS BOARD.

Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1022

In the Matter of:

ELWOOD C. MARTIN, FRED A. NEMEC, and ROBERT W. NEMEC, a co-partnership, d.b.a. NEMEC COMBUSTION ENGINEERS

and

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A.F.L.

TRANSCRIPT OF PROCEEDINGS

Room 602, 111 West Seventh St., Los Angeles, Calif.
Monday, January 21, 1952

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Before: Wallace E. Royster, Trial Examiner.

Appearances:

Daniel J. Harrington, 111 West Seventh Street, Los Angeles, California, appearing on behalf of the General Counsel of the National Labor Relations Board.

J. E. Simpson and R. D. Sweeney, 842 Title Insurance Building, 433 South Spring Street, Los Angeles, California, appearing on behalf of Nemec Combustion Engineers.

William Pounds, 6308 Pacific Boulevard, Room 311, Huntington Park, California, appearing on behalf of International Union, United Automobile Workers of America, A.F.L. [1*]

Trial Examiner Royster: This is a formal hearing before the National Labor Relations Board in the matter of Nemec Combustion Engineers, in Case No. 21-CA-1022.

My Name is Wallace E. Royster. I am the Trial Examiner designated to hear the evidence and to make recommendations.

Will counsel please state their appearances for the record?

Mr. Harrington: Daniel J. Harrington, appearing for the General Counsel of the National Labor Relations Board.

Mr. Pounds: William Pounds, of United Automobile Workers, A.F.L.

Trial Examiner Royster: I would like to have your local address for the record, Mr. Pounds.

Mr. Pounds: 6308 Pacific Boulevard, Huntington Park, California.

Mr. Grisham: George Grisham, 2612½ Broadway Street, Huntington Park, California, for the

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

International Union, United Automobile Workers of America, A.F.L.

Trial Examiner Royster: For the company?

Mr. Simpson: R. D. Sweeney and J. E. Simpson.

Trial Examiner Royster: Your address sir?

Mr. Simpson: 842 Title Insurance Building.

Trial Examiner Royster: Very well. The official reporter makes the only recognized transcript of these [3] proceedings. Any reference to the record here must be to that taken by the official reporter.

An automatic exception will be allowed to all adverse rulings made during the course of the hearing. At the close of the hearing any person desiring to file a brief should request permission at that time to do so, and we can at that time set the time within which briefs must be filed.

All right, Mr. Harrington.

Mr. Harrington: I would like to have the formal papers marked for identification.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 1-A through 1-J for identification.)

Mr. Harrington: I have had the formal papers on which this proceeding rests marked for identification as General Counsel's Exhibits 1-A through 1-J.

General Counsel's Exhibit 1-A, being an Affidavit of Service of Initial C Letter, Copy of Charge, upon Nemec Combustion Engineers, 2430 West

Whittier Boulevard, Whittier, California, to which is attached a return post office receipt card;

General Counsel's Exhibit 1-B, being the Charge against the employer, filed in this case on February 1, 1951;

General Counsel's Exhibit 1-C, being the Complaint in this case, dated November 14, 1951, signed by Howard F. LeBaron, Regional Director of the Twenty-First Region of the National [4] Labor Relations Board;

General Counsel's Exhibit 1-D, being the Notice of Hearing in this matter, dated November 14, 1951, signed by Howard F. LeBaron, Regional Director;

General Counsel's Exhibit 1-E, being an Affidavit of Service of Notice of Hearing, Complaint and Charge upon Nemec Combustion Engineers and upon International Union, United Automobile Workers of America, A.F.L.;

General Counsel's Exhibit 1-F, being the Answer of Respondent, filed in this matter on November 26, 1951;

General Counsel's Exhibit 1-G, being an Order Rescheduling Hearing, at the request of counsel for the respondent, dated November 27, 1951;

General Counsel's Exhibit 1-H, being an Affidavit of Service of Order Rescheduling Hearing upon Nemec Combustion Engineers, and upon International Union, United Automobile Workers of America, A.F.L.;

General Counsel's Exhibit 1-I, being an Order Rescheduling Hearing, dated December 4, 1951;

General Counsel's Exhibit 1-J, being an Affidavit

of Service of Order Rescheduling Hearing upon Nemec Combustion Engineers and International Union, United Automobile Workers of America, A.F.L.

I show General Counsel's Exhibits 1-A through 1-J for identification to the parties. [5]

Trial Examiner Royster: Have you made your offer, Mr. Harrington?

Mr. Harrington: Not yet, Mr. Trial Examiner. At this time I offer General Counsel's Exhibits 1-A through 1-J for identification in evidence.

Trial Examiner Royster: Is there objection?

Mr. Simpson: No objection.

Trial Examiner Royster: They are received.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-J for identification were received in evidence.)

Trial Examiner Royster: I neglected to mention all exhibits must be filed in duplicate.

Mr. Harrington: At this time I would like to call the Trial Examiner's attention to Paragraphs 1, 2, and 3 of the Complaint, issued in this matter, which are the paragraphs alleging the commerce of the respondent company.

And in that respect I would also like to call the Trial Examiner's attention to Paragraphs 1, 2 and 3 of the Answer of Respondent, in which respondent admits the allegations of Paragraphs 1, 2 and 3 of the Complaint, with the exception that respondent alleges that the principal place of business of the company is in Whittier, California.

Respondent admits it is in commerce within the meaning of Section 2, subsection (6) of the Act.

Trial Examiner Royster: I notice that the figures of [6] sales are for a period of 12 months ending September 30, 1950, which is now a year and a half behind us.

Mr. Harrington: Well, in that respect, the Charge was filed on February 1, 1951, and relates to events occurring in December 1950 and January 1951.

Trial Examiner Royster: All right.

Mr. Harrington: I expect some testimony in respect to a representation case will be involved to some extent in these proceedings. For the sake of convenience I would just like to put some of the particular dates and events in the representation case in the hearing.

I ask the Trial Examiner and the Board to take official notice of the representation case, but, just for the sake of convenience, I would like to read it into the transcript at this time.

In Case 21-RC-1726, a petition for representation of the employees of Nemec Combustion Engineers was filed by United Automobile Workers of America, UAW-AFL, on December 29, 1950. A consent election agreement was entered into between the parties on January 9, 1951, consenting to an election in an appropriate collective bargaining unit consisting of all maintenance and production employees.

An election was held on Tuesday, January 23, 1951. Thereafter, on January 29, 1951, objections to the election were filed by the union. [7]

On November 14, 1951, the Regional Director

issued a report on objections, and on November 15, 1951, a correction of the report was filed, and the correction states that because of the representation case depending, in part, on the outcome of the charges filed in the 21-CA-1022, the instant case, the Regional Director reserved ruling with respect to objections until the Board had issued its decision in 21-CA-1022.

I wish to call Mr. William Pounds.

WILLIAM POUNDS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): Will you state your name and address, Mr. Pounds?

A. William Pounds. 601 North Warren, La Habra, California.

Q. What is your occupation?

A. International representative for United Automobile Workers, A.F.L. ,

Q. As such international representative, do you have any particular district that you cover, or territory? A. Los Angeles area.

Q. How long have you had that position?

A. For two years.

Q. As part of your official duties, do you attempt to organize employees of different companies and plants? [8] A. Yes.

Q. As part of your official duties, did you con-

(Testimony of William Pounds.)

duct any organizational activities at the Nemec Combustion Engineers plant? A. Yes.

Q. Where is that plant located?

A. In Whittier, California.

Q. What was the first step you took in that regard?

A. The first step I took was in contacting Thomas Frederick, who was an employee at that time. I believe that was in October, the early part of October of 1950. He was to make inquiries in the plant, to see if the people did want organization——

Q. Well, let's take it one step at a time. Where did you contact him? A. At his home.

Q. When?

A. In the early part of October in 1950.

Q. Did you have a conversation with him?

A. Yes.

Q. Was anyone else present?

A. Yes, an employee of Modine Manufacturing Company.

Q. What was his name? A. Mel Gervais.

Q. What was the conversation? [9]

Mr. Simpson: That is objected to as calling for hearsay.

Trial Examiner Royster: What is the purpose of the offered testimony?

Mr. Harrington: I am just going to lay the background of the organizational activities at the company's plant, in order to lead up to my 8(1) and 8(3).

Mr. Simpson: It would still be hearsay.

(Testimony of William Pounds.)

Trial Examiner Royster: You agree anything that may have passed between these two individuals is not in the hearing of anybody for the company?

Mr. Harrington: Surely.

Trial Examiner Royster: And doesn't constitute notice to the company that any such matters were discussed on this occasion?

Mr. Harrington: Surely. As I say, I am just attempting to put it in as background.

Trial Examiner Royster: All right. With that understanding, go ahead.

The Witness: Repeat the question, please.

Q. (By Mr. Harrington): What was your conversation?

A. It was in regard to organizing the Nemec Combustion Engineers plant.

Q. What was said?

Mr. Simpson: It is understood this objection of hearsay is not binding on the company and goes to all this conversation [10] held outside of the presence of the company and its officers.

Trial Examiner Royster: It is so understood.

The Witness: Repeat the question.

Q. (By Mr. Harrington): What was the conversation? What was said? What did you say and what did Mr. Frederick say?

A. I asked Mr. Frederick to make inquiries in the plant in regard to organizing it. He said he would do all he could to help in that line.

Q. Was there anything more to that conversation?

(Testimony of William Pounds.)

A. Nothing more except that I explained in full our organization and how it operated, and so on and so forth.

Q. Did you continue to engage in organizational activities?

A. Yes. I made periodical visits to Mr. Frederick's home, to check on how, what progress he was making.

Q. How long did you continue your organizational efforts?

A. Up until January, about the middle of January. Then I was going to be out of town for a couple of weeks, and I turned the campaign over to William Smith, who was at that time a part-time representative for the UAW-AFL.

Q. Was Mr. Frederick employed at Nemec at that time? A. Yes.

Mr. Simpson: I am not clear as to what time you are talking about, Mr. Harrington.

Trial Examiner Royster: I am not, either.

Mr. Simpson: You mean December or January?

Mr. Harrington: I was trying to place the time more correctly. I think the witness is mistaken. I am trying to place it more correctly.

Q. (By Mr. Harrington): What is your best recollection as to when you turned the campaign over to Mr. Smith?

A. Around the middle of January, I think around the 17th. At that time I introduced him to Mr. Frederick and several Modine employees, who were to help him in the campaign.

(Testimony of William Pounds.)

Q. Now, did you ever participate again in the campaign?

A. Yes, on my return from the east.

Q. When did you return from the east?

A. I returned the 26th of December.

Q. Well now, you stated you left for the east in January.

A. I made a mistake. It was December 17th. Excuse me. It was December 17th instead of January. And I returned on the 26th.

Mr. Harrington: I have no further questions.

Mr. Simpson: No questions.

Trial Examiner Royster: All right, Mr. Pounds.

(Witness excused.)

Mr. Harrington: Mr. Smith. [12]

WILLIAM SMITH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): What is your name and address?

A. William Smith. 424 North Atlantic in Monterey Park.

Q. What is your occupation?

A. My occupation is international representative, United Auto Workers, A.F.L.

Q. How long have you had that position?

(Testimony of William Smith.)

A. Approximately since February 14, 1951, on a full-time base.

Q. Before that time, were you connected with the union?

A. I was a part-time worker.

Q. Are you acquainted with Mr. Thomas Frederick? A. I am.

Q. When did you meet him?

A. December 17, 1950.

Q. How did you happen to meet him?

A. There was a meeting held at Modine local hall in Whittier the night of the 17th, for the sole purpose of meeting Mr. Frederick, and we met with other employees of Modine, and Mr. Pounds introduced me to Mr. Frederick.

Q. Did you engage in any organizational activity with Mr. Frederick? [13] A. I did.

Q. What was that activity?

A. I kept in continuous contact from the 17th on, until the 26th day of December, 1950, when we handbilled the plant. By "we" I mean myself and other employees of Modine.

Q. Was Mr. Frederick there?

A. Mr. Frederick came out when the shift changed.

Q. Did you ever give Mr. Frederick any authorization cards?

A. I gave him approximately a hundred cards.

Q. When did you give them to him?

A. If I recollect right, it was on the 27th, I believe.

(Testimony of William Smith.)

Q. Did he ever give any back to you?

A. On the evening change of shift, the 28th day of December, 1950, he gave me approximately 55 cards back. Also, informed me he had been discharged.

Q. Now, when you say he gave you 55 cards——

Mr. Simpson: I move the testimony as to what Frederick informed the witness be stricken, on the grounds it is hearsay and not binding on the company.

Trial Examiner Royster: As to the fact of his discharge?

Mr. Simpson: As to whether he said he had been discharged.

Trial Examiner Royster: Well, it isn't hearsay. This witness heard Frederick say he was discharged. It is hearsay as to the ultimate fact, actually whether or not he was [14] discharged; it doesn't tend to prove that.

Mr. Harrington: I am not trying to prove the ultimate fact.

Trial Examiner Royster: The company wasn't there. It isn't hearsay, though. I will overrule the objection.

Q. (By Mr. Harrington): The cards you gave Mr. Frederick and he gave you back, were they blank or signed?

A. They were authorization cards, all signed.

Mr. Harrington: I have no further questions.

Mr. Simpson: No questions.

Trial Examiner Royster: That is all.

(Witness excused.)

Mr. Harrington: Mr. Snodgrass.

HERBERT J. SNODGRASS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): What is your name and address?

A. Herbert J. Snodgrass. 5945 Atlanto Street, Bell Gardens.

Q. Where are you employed?

A. Nemec Combustion Engineers.

Q. Are you appearing here in response to a subpoena? A. Yes, I am.

Q. How long have you been employed by Nemec?

A. 19 months. [15]

Q. In what capacity? A. Welder.

Q. You were so employed in December of 1950, were you not? A. I was.

Q. Did you ever have any conversation with Mr. Nemec on or about December 27, 1950?

A. Yes, we did.

Q. Was anyone else present at that conversation?

A. Everyone on the night shift in the weld shop was present.

Q. Beg pardon?

A. Everyone on the night shift in the weld shop was present.

(Testimony of Herbert J. Snodgrass.)

Q. How many people would that be, about?

A. About 11 welders and 4 burners, I believe, at that time.

Mr. Simpson: Will you keep your voice up, please? You drop it and I don't hear you.

The Witness: Sure.

Q. (By Mr. Harrington): Where was this conversation?

A. It was held in my booth, welding booth.

Q. What was the conversation? Do you remember the names of any of the welders who were present?

A. Yes. Mr. Lee Blair and Mr. Leeper, Billie Winn. Let's see who else; myself and several others.

Q. Mr. Leeper, is that Mr. Clarence Leeper?

A. Yes.

Q. Was he a welder? [16] A. Yes.

Q. In the plant? A. Yes.

Q. What happened on that occasion?

A. Well, we contacted the night superintendent, wanting a night bonus and paid lunch period.

Q. What was his name, do you know?

A. Bob Milliron.

Q. What did you say to him?

A. We asked him to get hold of Mr. Martin, but he was unable to get hold of Mr. Martin, so he got hold of Mr. Nemec.

Q. What was Mr. Nemec's first name?

A. That I couldn't say.

Q. There are two Mr. Nemecs, are there not?

A. The older one.

(Testimony of Herbert J. Snodgrass.)

Q. This is the elder one? A. Yes.

Q. Are they father and son? A. Yes.

Mr. Harrington: Will counsel for the company stipulate that the elder Mr. Nemec's name is Fred?

Mr. Simpson: Yes.

Mr. Harrington: And that he is a partner in the company?

Mr. Simpson: He is named in the caption of your Complaint. [17]

Mr. Harrington: That is, the individual.

Mr. Simpson: Yes. Fred A. Nemec, co-partner. And the son's name is Robert W. Nemec, shown in the caption.

Q. (By Mr. Harrington): Now, did Mr. Leeper come there? A. Yes.

Q. When did he come?

A. To the meeting?

Q. Yes.

A. He was there at the beginning of the meeting.

Q. I understood you to say there was a night superintendent you——

A. Mr. Leeper and I and the rest of the welders contacted the night superintendent.

Q. I see. Do you know the night superintendent's name? A. Bob Milliron.

Q. Did Mr. Nemec come there?

A. He went and got him.

Q. Mr. Milliron went and got Mr. Nemec?

A. Yes.

Q. Did Mr. Nemec come to the meeting?

(Testimony of Herbert J. Snodgrass.)

A. Yes, he did.

Q. Now, where was that meeting held, in whose booth? A. In my booth.

Q. In your booth? A. Yes. [18]

Q. What was the conversation with Mr. Nemec?

A. We were trying to get a night bonus, plus paid lunch period. And Mr. Nemec didn't agree right away, and some of the boys——

Q. Can you recite the conversation, as best you can remember it? Who did the talking?

A. Mr. Leeper talked mostly.

Q. For you fellows, is that right? A. Yes.

Q. Mr. Nemec did the talking for the company?

A. Yes.

Q. Now, can you recall the conversation?

A. Well, all I can say is that we asked, Mr. Leeper asked for the bonus and Mr. Nemec said that he would check into it.

Mr. Leeper made the statement that he would give him 24 hours in which to give him an answer and if he hadn't answered in that time that he was quitting.

Q. Now, did any other welder say anything about quitting?

A. Yes. I don't recall the boy's last name, but he was an SC student at the time; his name was Bill.

Q. What did he say?

A. He was only a partial worker, part-time worker. He said, "So far as I am concerned, you can give me mine now."

Mr. Nemec told him, "Well, just go on to the

(Testimony of Herbert J. Snodgrass.)

office. We don't want any hotheaded characters around here." [19]

Q. Did he tell Mr. Leeper to go to the office?

A. No.

Q. Was there anything more said in that meeting?

A. Well, that just about closed the meeting that particular night.

Q. Did the employees go back to work after the meeting? A. Yes.

Q. Did Mr. Leeper go back to work, too?

A. Yes.

Q. Did Mr. Leeper return the next day?

A. He came back to the shop, but he never came to work.

Q. He didn't work? A. No.

Q. What did he do when he came back, do you know?

A. I do not know. They was in the office, is all I know.

Q. Did the employees ever get the bonus and paid lunch period? A. Yes.

Q. Do you know what the bonus was?

A. Five cents.

Q. Did they get a five-cent raise?

A. Yes.

Q. Did they get a bonus in addition to it?

A. Yes.

Q. What was the bonus they received? [20]

A. Five cents night bonus.

Q. Five cents night bonus?

(Testimony of Herbert J. Snodgrass.)

A. Yes, five cents an hour.

Q. Did they get pay for the lunch period?

A. Yes.

Q. Did the employees get any other concessions?

A. Well, the first of the year we got—that is, the other five cents was the first of the year.

Q. How about holidays?

A. We got six paid holidays.

Q. How about vacations?

A. Well, as I say, the company has paid vacations, but for a long time—but they made it out, a statement on the bulletin board for us.

Q. When did you get those things you have just recited?

A. That all came the first of the year.

Q. January of 1951? A. That is right.

Q. I don't recall whether or not I asked you what date this meeting with Mr. Leeper was.

A. Well, it was between the middle of the month and Christmas time—just after Christmas; I don't remember just exactly.

Q. In December? A. Yes. [21]

Q. Had you received any raise before that, you, yourself?

A. I had received several raises before that.

Q. When was the last one you received before that? A. Oh, in November, I believe.

Q. Was that raise given to everybody, do you know?

A. No, that was an individual raise.

Q. Did you ask for that raise? A. Yes.

(Testimony of Herbert J. Snodgrass.)

Q. Now, did you ever have a conversation with Mr. Nemec in a group after that?

A. We did.

Q. When?

A. I couldn't state the date. It was in January, I will say that.

Q. Was it before the election that was held at the plant? A. Yes.

Q. Where was that meeting held?

A. We all gathered in his office.

Q. When you say "we all," whom do you mean?

A. Well, I mean the shop in general.

Q. All the employees? A. Sure.

Q. How did you happen to gather in his office?

A. We wanted to discuss what we had and what we wanted.

Q. Whose office was it? [22]

A. Mr. Nemec's.

Q. Did he ask the group to come in the office?

A. Not necessarily, no.

Q. What do you mean by that statement.

A. Well, everybody was—could come in that wanted to.

Q. Had any arrangements been made with Mr. Nemec to come into the office? A. No.

Q. Everybody just walked in, is that it?

A. Well, they all gathered together and went.

Q. What occurred at that meeting?

Trial Examiner Royster: First, I would like to know if this is all the employees on the night shift or all the employees in the plant.

(Testimony of Herbert J. Snodgrass.)

The Witness: The employees of the night shift.

Trial Examiner Royster: I see.

Q. (By Mr. Harrington): Were you on the night shift? A. Yes.

Q. What were your hours?

A. From 4:30—well, from 5:00 o'clock to 5:00 o'clock in the morning, lots of times.

Q. From 5:00 p.m. to 5:00 a.m.? A. Yes.

Q. What time of day was this meeting held?

A. About 7:30, 8:00 o'clock at night. [23]

Q. Who was there from the company?

A. Who was there?

Q. Yes. Was Mr. Nemec there? A. Yes.

Q. Anyone else there?

A. Mr. Martin was there.

Q. Who is Mr. Martin? What is his first name, do you know? A. I can't remember.

Q. Do you know his position?

A. He is production manager, and part owner.

Q. What happened at that meeting?

A. It was more or less a discussion of what we had and what the union had.

Q. What was the discussion, as closely as you can remember it? If you can't remember the exact words, just what the substance of it was.

A. Well, our base wages and what the union wages were, and what——

Q. What was said about your base wages?

A. Well, we do have good wages.

Q. Who said that? A. We do.

Q. I am asking you. I want to know what was

(Testimony of Herbert J. Snodgrass.)

said at that meeting. Was something said about base wages?

A. Well, it was just a matter of what we had that the union [24] had and nothing pertaining to the union or against the union, or anything else.

Q. Did Mr. Nemec say anything about wages?

A. No.

Q. Did Mr. Martin?

A. Not necessarily.

Q. What was said about wages?

A. We were talking, discussing wages, and wanting to know what opportunity of more wages was, which he told us at that time, that he could get us more wages.

Q. Who said that? A. Mr. Martin.

Q. What did he say about getting you more wages?

A. He didn't have much to say about it.

Q. What did he say?

A. Except he could always change our classification and get us more wages.

Q. Did he say he would?

A. No.

Q. Now, did he say anything about wages in any other plant?

A. He mentioned how much other plants were getting, yes.

Q. What did he say about the other plants?

A. Well, in other words, at the time we were trying to get a raise. And he had checked with other plants and found out what they were paying. [25]

(Testimony of Herbert J. Snodgrass.)

Q. Did either Mr. Martin or Mr. Nemec say anything about the union?

A. Only that we could join the union, if that was our desire.

Q. Did either one of them say anything else about it? A. Not that I remember.

Q. Now, as a welder, what sort of equipment does a welder use?

A. Well, uses welding machine.

Q. I mean, does he have a hood? A. Yes.

Q. Does he have gloves? A. Right.

Q. Does he have a hammer or chisel or tools of that nature?

A. It is not necessary to have a hammer, excepting a chipping hammer once in a while.

Q. Who do the tools belong to?

A. The welder.

Q. Does the welder leave his tools at the plant?

A. That is right.

Q. Or take them home every day?

A. He leaves them at the plant.

Q. What happens if a welder is discharged or quits?

A. As a rule, he picks up his tools.

Q. And takes them with him? [26]

A. Yes.

Q. Did Mr. Nemec or Mr. Martin say anything about comparing their wage rates with wage rates in union plants? A. Naturally.

Q. What did they say about union in that connection?

(Testimony of Herbert J. Snodgrass.)

A. They just compared what wages we had with what union wages were in some of the other plants.

Q. What did they say in making that comparison? A. Nothing I can remember now.

Q. Did they say their wage rates were higher or lower than the wage rates in the union plants?

A No. They just compared the wages which were higher; we all knew that.

Q. Which wages were higher?

A. Ours.

Q. What was higher, your base wage or the wage you were getting?

A. The wage we were getting.

Q. Did he say anything about whether the base wage was higher or lower? A. No.

Q. Was it higher or lower?

A. Well, I don't know. I don't check up on enough of that stuff.

Mr. Harrington: I have no further questions.

Cross Examination

Q. (By Mr. Simpson): Mr. Snodgrass, if I understand your testimony correctly, you had received a wage increase in November 1950?

A. Yes, sir.

Q. Did you receive any further wage increases after that November increase? A. Yes, sir.

Q. In 1950?

A. Well, nothing but the night bonus, which didn't take effect until '51.

Q. Do you recall a general wage increase which

(Testimony of Herbert J. Snodgrass.)
was put into effect by the company about December 7, 1950? A. Yes.

Q. That was—— A. Five cents.

Q. That was additional increase to the individual one you previously received? A. Yes.

Q. Had you ever participated in any discussions with any of the owners of the company, in which the owners explained the financial condition of the company, and that as their production increased it was their purpose to put in wage increases?

A. Right.

Q. Had that been said by representatives of the company? [28] A. Yes.

Q. Who had made such statements as that?

A. Mr. Martin.

Q. Were those statements made prior to December 27, 1950? That is, were those statements made before the union organizational activities began?

A. Well, so far as I know, yes.

Q. Now, if I understand your testimony correctly, and if I don't state it correctly you correct me on it, you were working in your booth on the night shift about the 27th of December, 1950, and all of the welders who were on the night shift were collected in or around your booth? A. Right.

Q. Mr. Miller was the night superintendent?

A. Milliron.

Q. Milliron? A. Yes.

Q. Mr. Leeper told Mr. Milliron——

Mr. Harrington: I object to that. I don't recol-

(Testimony of Herbert J. Snodgrass.)
lect any testimony of Mr. Leeper having told Mr. Milliron anything.

Mr. Simpson: My notes say that Leeper was the man that was doing the talking.

Trial Examiner Royster: That is my recollection.

* * * * * [29]

Q. (By Mr. Simpson): Mr. Leeper told Mr. Milliron he wanted a shift bonus and to be paid for the lunch period?

A. We told them as a group.

Q. With Mr. Leeper acting as spokesman, is that it?

A. He did the most of the talking after we got hold of Mr. Nemec.

Q. I am talking about before you got to Mr. Nemec. Who talked to Mr. Milliron?

A. All of us, practically.

Q. I see. Mr. Milliron said he would have to get hold of somebody connected with the management? A. Yes.

Q. He went and got Mr. Fred Nemec?

A. Yes.

Q. Mr. Nemec came over to your booth?

A. Yes.

Q. And at that time Mr. Leeper told Mr. Nemec that they wanted a shift bonus?

A. That is right.

Q. And they wanted to be paid for the time that they ate, is that correct?

A. Yes. [30]

(Testimony of Herbert J. Snodgrass.)

Q. Did he say how much of a shift bonus they wanted?

A. Well, he said the most of the companies were paying 10 per cent and 20 per cent for graveyard.

Q. This was not a graveyard shift?

A. No, but it was the combined he was more or less interested in.

Q. What did Mr. Nemec say in answer to that?

A. He said he would check into it. It seems as though some of them had talked to Mr. Martin and Mr. Gilly, and Mr. Nemec was kind of in the dark. He said he would check into it.

Q. And talk to Mr. Gilly and Mr. Martin?

A. Yes. And call different companies and find out.

Q. At that time did Mr. Leeper say he would give Mr. Nemec 24 hours in which to grant these demands or he was going to quit?

A. That is right.

Q. But did Mr. Leeper also say he would continue working out the shift?

A. That I don't know.

Q. He did, however, work out the shift?

A. He worked out the shift, yes.

Q. Were you present the following day or evening when Mr. Leeper had any conversation with anybody connected with management?

A. No. [31]

Q. Did Mr. Leeper come in and get his tools the following day and leave?

A. Not that I seen. I was busy; I couldn't say.

(Testimony of Herbert J. Snodgrass.)

Q. But he didn't work there after that night?

A. No.

Q. Did Mr. Leeper say that if he didn't get this raise or this bonus and this lunch hour bonus, that he was going to come back and get his tools and quit?

A. He didn't say anything about coming back and getting his tools. He just said he would quit, he was through.

Q. This other chap you say spoke up and said so far as he was concerned he would take his time right then?

A. That is right.

Q. Did he leave then?

A. Yes, he went to the office.

Q. At this meeting that you have just been testifying about, with Mr. Nemec, was there any discussion whatsoever concerning the union?

A. No.

Q. Had you heard Mr. Leeper make any statements to the effect that he was antiunion or opposed to unions?

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: At this meeting, you mean?

Mr. Simpson: Either then or otherwise.

Mr. Harrington: I would object to going beyond this [32] meeting. I haven't questioned the witness on anything with respect to that at any point in the direct examination.

(Testimony of Herbert J. Snodgrass.)

Mr. Simpson: He can answer yes or no. Maybe he never heard it.

Trial Examiner Royster: Yes. I will let him answer.

The Witness: He never come out and definitely said he was against the union, but he always talked sort of away from the union side.

Trial Examiner Royster: You had the impression he was against the union?

The Witness: Yes.

Trial Examiner Royster: All right.

Q. (By Mr. Simpson): Mr. Snodgrass, had you participated in any discussions between employees and any members of management of Nemec Combustion Engineers relative to the possibility of a wage freeze being put into effect? A. Yes.

Q. Do you recall when those conversations were held?

A. Not exactly what dates or anything.

Q. I don't mean the specific date. Can you tell me when it was with respect to the time that you received this wage increase in December, 1950?

A. It was after that, I believe.

Q. Was it before the 1st of January, to the best of your recollection, or after that? [33]

A. It was after the 1st.

Q. With what management representatives were these discussions had about wage freezes?

A. Well, Mr. Nemec and Mr. Martin.

Q. You were present? A. Yes.

Q. What was said on that subject?

(Testimony of Herbert J. Snodgrass.)

A. Well, they claimed they would have to take it to the National Labor Relations Board, in order to get more, or they could turn around and change classifications. That it wasn't the top wages at that time.

Q. There was considerable concern over the fact that the rumor was going around that wages were going to be frozen? A. That is right.

Q. Did you hear either Mr. Martin or Mr. Nemec state to any of the employees that the company intended to grant a wage increase in January 1951, but they had been told by a representative of the Labor Board they would have to hold off until after the union election? A. No.

Q. You don't recall that? A. No.

Q. Did anyone connected with the company, on behalf of management, ever tell you, in substance or effect, that if you voted against the union at the election, that you would be [34] granted a wage increase? A. No.

Q. If I understood your testimony correctly, either Mr. Martin or Mr. Nemec told you that the employees were free to join a union or not, as they saw fit?

A. That is right; that they were not to intimidate anybody in any way.

Mr. Simpson: Thank you, Mr. Snodgrass. That is all at this time.

Redirect Examination

Q. (By Mr. Harrington): Just a moment.

(Testimony of Herbert J. Snodgrass.)
When Mr. Martin said the employees were free to join the union or not, what did he say in that connection? Was there any other mention of a union in that conversation?

A. No.

Q. How did he happen to mention the union?

A. Well, we were having this discussion on them, about the wages of other places that were union, and the wages we had, and he stated that the meeting was not to try to keep us from joining any union.

Q. What else did he say?

A. That was his first statement, in order to clear himself out of it.

Q. That was his opening statement, is that right?

A. Yes. [35]

Q. What was his next statement?

A. Well, just the discussion went on about the wages then.

Q. What was the discussion?

A. Well, he had called different places and found out what the wages was running in other companies. As I said before, we were trying to get more money at the time.

Q. Now, did Mr. Martin say you were getting more wages than they were getting in union plants?

A. We were.

Q. Did he say that? A. Yes.

Q. Did he say anything else with respect to the union? A. No, not that I remember.

Q. Now, you have testified as to some conversation with respect to wage increases as production

(Testimony of Herbert J. Snodgrass.)

increased, being statements that Mr. Martin made. When was that?

A. As production increased——

Q. Do you recall making that statement?

A. That was long before, because our production was almost at tops when we got all these increases.

Q. When was that statement made by Mr. Martin?

A. I think that was in a former meeting.

Q. When do you recall when that meeting was?

A. The first part of December.

Q. What was said in that meeting? [36]

A. Well, it was more or less just a small group of us in that meeting, anyway.

Q. Where was that meeting held?

A. In the weld shop.

Q. Was anything said about the union by Mr. Martin?

A. No, that was a long time before the union was thought of, so far as we knew.

Q. Can you recall what month it was?

A. That was in December, first part of December.

Q. The union was in the plant in December, was it not, organizing in December?

A. Not that I knew of. I didn't even know that the union was in there until after the 27th or 28th, before the union was contacted by me.

Q. You say the statement was made by Mr. Martin around the first of December?

(Testimony of Herbert J. Snodgrass.)

A. That is right.

Q. You made some statement about wage increases as production increased.

A. That is right.

Q. Do you remember anything else that was said in that meeting? A. No.

Q. You testified there was a conversation with respect to a wage freeze, or discussions. [37]

A. Yes, that is right.

Q. Was there more than one conversation with respect to wage increases? A. No.

Q. That conversation, you testified, was with Nemec and Martin?

A. That all came up on the same night.

Q. What do you mean by the same night?

A. The same night we had all the discussion about the wages. That was all in one meeting.

Q. That was a meeting you had in the office, is that right? A. Yes.

Q. What was said about the wage freeze in that meeting?

A. Well, he said he wasn't at top wages, but he—if they had a wage freeze they would have to go through the National Labor Relations Board, in order to get it, an increase in wages. He could also change classifications and get more wages.

Q. Did he say anything about the union in that meeting? A. No.

Q. Did he mention the word "union"?

A. No, not that particular subject.

Q. Had the employees asked Mr. Nemec to make

(Testimony of Herbert J. Snodgrass.)

a survey of union plants, to compare wages?

A. Had the employees asked him?

A. Yes. [38] A. Oh, yes.

Q. When did they ask him?

A. They had asked him—discussed several times; that had been a discussion for several months.

Q. What was the discussion?

A. Well, when they first started on our night bonus, and everything, of the type of work we do. We have always felt we rated a little more wages than other people.

Mr. Harrington: I have no further questions.

Recross Examination

Q. (By Mr. Simpson): Mr. Snodgrass, was it customary for the welders to meet with Mr. Martin from time to time, regarding wages, production and working conditions? A. That is right.

Q. So this meeting that you were talking about, in December, was just another one of those kind of meetings?

A. That is right. They have always been free to go up and talk to Mr. Martin at any time we felt like it.

Q. Absolute freedom——

A. As a group or as an individual.

Q. Absolute freedom back and forth for any employee that wanted to go to management and talk to management? They were free to go to management at any time? A. That is right.

Q. From time to time you would meet with him

(Testimony of Herbert J. Snodgrass.)

because he had [39] charge of production, layout production, and see how it was going?

A. That is right.

Q. And discussed conditions, including wages?

A. Yes.

Q. Had the employees asked the company to make a survey and determine what other companies were paying, by way of wages?

A. That is right.

Q. This meeting you had with Mr. Martin was for the purpose of giving you that information?

A. That is right.

Mr. Simpson: I think that is all.

Redirect Examination

Q. (By Mr. Harrington): When did the employees ask Mr. Martin to make a survey of other plants?

A. We asked for that several times. The first time, I believe, was along in September.

Q. September of 1950?

A. That doesn't include all employees. That includes the weld shop.

Q. Just the welders? A. Yes.

Q. The welders had asked Mr. Martin in September to make a survey of other plants?

A. We have always had—what I mean is discussed wages back [40] and forth.

Q. I am asking you the specific question about making a survey of the wage rates in the plants. You asked Mr. Martin that in September?

(Testimony of Herbert J. Snodgrass.)

A. Yes.

Q. Did you ask him that again any time after September? A. Oh, sure.

Q. When? A. Every time we met.

Q. How often was that?

A. I would say two or three times after that.

Q. Did you ask him in October?

A. I believe so.

Q. Did you ask him in November?

A. No; the first part of December.

Q. Those were the times you asked him. What did he say to you on those occasions?

A. Well, of course, they have their arguments. It is only natural. I mean, they try to hold their end of it, because of production.

Q. What did they tell you with respect to wages in other plants in September?

A. We were getting about as much—we were getting more than what other plants were getting.

Q. They told you that in September? [41]

A. Sure.

Q. Were they speaking of your base wage or your actual wage?

A. Base wages are actual wages, so far as I can see.

Q. Would you say you were getting as much base rate as in other plants, or as much as the actual rate? A. I would say the actual rate.

Q. Is that what they said?

A. No, they didn't make no statements.

Q. Who made the statements, Mr. Martin?

(Testimony of Herbert J. Snodgrass.)

A. Yes.

Q. What did he say with respect——

A. The base wage — I don't know anything about the bonus or anything.

Q. Did he say anything about the bonuses other plants get? Did he say anything about actual wages other plants were getting?

A. Actual wages, yes.

Q. Did he say that the actual wages in other plants were higher or lower than in your plant?

A. I can't recall that he made those kind of statements.

Mr. Harrington: I have no further questions.

* * * * * [42]

WILFORD G. KUNS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): Will you give your name and address to the reporter, please?

A. Wilford G. Kuns. 306 South Milton, Whittier, California.

Q. Are you appearing here, Mr. Kuns, in response to a subpoena?

A. Subpoena from the National Labor Board, yes, sir.

Q. Where are you employed, Mr. Kuns?

(Testimony of Wilford G. Kuns.)

A. I am employed at the Nemec Combustion Engineers.

Q. How long have you been employed there?

A. Since the 19th of August, 1950.

Q. Did you ever have a conversation with Mr. Elwood Martin with respect to the union?

A. Not the union exclusively. The union was——

Q. When was that conversation, do you recall?

A. The last one we had was on the 21st of January, 1951. There had been prior discussions, too.

Q. In this last discussion, who was present?

A. Mr. Martin and myself only.

Q. Where was the discussion? [43]

A. In the plant.

Q. What was the discussion?

A. The discussion was in relation to a wage increase and the wage freeze. It had been stated in the newspapers that there would be a wage freeze, and, of course, it hadn't been put in effect yet, at that time, but it was very definitely—had been stated in the newspapers, so it was not just a hearsay or rumor or circulated——

Q. What was said by Mr. Martin?

A. Mr. Martin said because of the cost of production and cost of tooling for this contract that we had been working on, that they were not able to give the wage increase that the fellows was asking for, and I myself was asking for one personally from him.

He said as the company built their funds up—in other words, as they built these chambers or tanks

(Testimony of Wilford G. Kuns.)
we are making they would have more money, and they would naturally benefit the employees by giving them increases as they saw fit to give them to them.

Q. Did he say anything else in that conversation?

A. I believe there was a—he said, we were talking about the different wages in the different plants around over the country, and that I myself had worked in other plants and I knew approximately what the wages were.

Of course, I was more or less interested in the wages as [44] a spray painter and not as anything else, because that is my business at that plant, is spraying those tanks for them. I knew I wasn't getting exactly the union wages, but I was satisfied with what I was getting at that time.

Q. What did Mr. Martin say?

A. And Mr. Martin made the statement that if —so far as I can recollect, as I said before—that as the company grew, the more money they would make the more money we would make. So far as the union was concerned, that he couldn't meet the union demands at that time, in the propaganda that the union had passed out at the gates. He couldn't possibly meet that, because of the fact that they were asking for more than he could possibly stand.

Q. Did he say anything else with respect to the union? A. I can't truthfully say that.

Q. Did he say anything with respect to contracts the company had with other companies?

(Testimony of Wilford G. Kuns.)

A. So far as I know the only contract they had at that time——

Q. Did he say anything with respect to it?

A. Well, I believe he said if he had to meet the union scale it would be prohibitive to bid on the other contracts, if he were to try to get them.

Q. Did he say anything else, that you can recall?

A. He made no promises to me personally.

Q. I want to know what he said in that conversation, is all [45] I want to know.

A. I can't remember of anything else that he said.

Q. Can you remember if he said anything else with respect to the union, besides what you have testified to? A. No.

Q. Do you recall making an affidavit to an agent of the Board, with respect to this matter?

A. Yes.

Q. I show you a two-page document. Is that your signature (indicating)?

A. Yes, sir.

Q. I ask you to read this second paragraph, to see if it refreshes your recollection. This paragraph here (indicating).

A. (Witness complies.)

Q. Does that refresh your recollection as to whether Mr. Martin said anything else in that conversation with respect to the union?

A. Well, I haven't stated just about everything that I——

Q. Well, to refresh your recollection, did he

(Testimony of Wilford G. Kuns.)

say anything about the election, if the union won the election?

A. Well, it is there—I must have said it, but I don't remember——

Q. Will you read this (indicating)?

A. I read that.

Q. Read it out loud. [46]

Trial Examiner Royster: Why read it out loud?

Mr. Simpson: I have read it, Mr. Trial Examiner. It seems to me it is entirely consistent with what the man just testified to.

Trial Examiner Royster: Anyway, it is being used now for refreshment purposes. I don't see any point in reading it in the record.

Q. (By Mr. Harrington): Does it refresh your recollection if he said anything about what would happen if the union won the election?

A. I will read that out loud.

Q. No. The Trial Examiner doesn't want you to. I want to know, does it refresh your recollection as to whether or not Mr. Martin made any statement about what would happen if the union won the election?

A. Hell, I don't know. Excuse the language. I am so damn mixed up I don't know what I am saying hardly.

Trial Examiner Royster: That is less than a year ago. I think you are a rather intelligent man. Can't you recall whether or not there was something else? There was or there wasn't? I think you should be able to remember that.

(Testimony of Wilford G. Kuns.)

The Witness: He said, like it says here (indicating). If I remember correctly, he said that if the union won the election, that the demands would be so high he wouldn't be able to meet their demands. That he didn't tell me—am I allowed [47] to say this——

Trial Examiner Royster: Surely.

The Witness: He didn't promise me anything personally if I voted for the union or against the union. He told me to make up my own mind; so far as the statement is concerned here, that I made, it was made six or seven months after the election had been held and I was——

Trial Examiner Royster: Your statement isn't in evidence. It is merely a matter of your recollection.

Mr. Harrington: That is right.

The Witness: Haven't I said that he said if——

Q. (By Mr. Harrington): Do you want the reporter to read your answer back?

Trial Examiner Royster: Well, I don't know just what the witness may have in mind.

Mr. Harrington: I don't, either.

Q. (By Mr. Harrington): Your best recollection of what he said would happen if the union won the election——

A. The best recollection I can remember of the conversation, altogether, was that the tooling was costly. That at the time that we were holding the conversation he could not give us the raise, could not give me a raise. But as things would progress,

(Testimony of Wilford G. Kuns.)
he would give each man individual consideration. And as the company made more money, if we came up and asked him for more money, he would consider it. [48]

And that if the—with all due respect to the union, that their demands were too high. If the union won, that he would not be able to compete in open competition with other companies and be able to get the contracts, to be able to make more money, to be able to give us more money.

Mr. Harrington: I have no further questions.

* * * * * [49]

Cross Examination

Q. (By Mr. Simpson): I will withdraw it and put it to you this way: Were you [50] told by Mr. Martin or any other member of the management of Nemec Engineers if you voted against the union you would receive a wage increase?

A. Not personally, he did not tell me which way to vote. The conversation was not at this time—or any other time had anything to do with the way I was going to vote, for or against the union.

Q. If I understand your evidence correctly, in this conversation of January 21st Mr. Martin said that if the company's business increased and they made more money, that they would pay more money to the employees?

A. That is the conversation.

Q. So far as the union was concerned you were free to vote any way you saw fit?

(Testimony of Wilford G. Kuns.)

A. That question was not brought up. What I mean is so far as which way I was going to vote, for or against the union, he did not ask me which way I was going to vote. I didn't tell him. He didn't figure it was any of his business, and I didn't figure it was any of my business what he wanted me to do.

* * * * * [51]

THOMAS FREDERICK

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): Will you give your name and address to the reporter?

A. Thomas Frederick. 1327 Coachman Avenue, Whittier, California.

Q. Were you ever employed by the Nemec Combustion Engineers? [52] A. Yes, sir.

Q. When?

A. Well, the first time was from August 2, '46, and I think until January '50. And then I was laid off——

Q. Until what?

A. I was laid off for a short period.

Q. January what?

A. I am not certain.

Trial Examiner Royster: I thought he said January 1950.

(Testimony of Thomas Frederick.)

The Witness: Yes, pretty close.

Q. (By Mr. Harrington): I am sorry. What type of work did you perform in that period?

A. When I first started it was just general work. After that, operating, and then setup and maintenance work, and operating and different types——

Q. When you say "operating" what do you mean? Operating what?

A. On different machinery.

Q. Setting up, was that setting up machines?

A. Yes.

Q. Did you work full time during that period?

A. Yes.

Q. Now, what happened in 1950?

A. When I was laid off their work had slowed down, and quite a few of the boys were laid off at the time.

Q. Did you go back to work for the company?

A. Yes.

Q. When? A. Two weeks later.

Q. When? A. Two weeks later.

Q. How long did you continue to work then?

A. Let's see, I was laid off again; I am not sure of the date. I am not too familiar with the dates.

Q. Did you work full time?

A. I attended school in February '50.

Q. What happened when you attended school?

A. I talked to Mr. Martin and we made an agreement I should work part time.

Q. Did you continue to work part time from then on? A. Yes.

(Testimony of Thomas Frederick.)

Q. For how long?

A. Until I was discharged December 28, 1950.

Q. 1950? A. Yes.

Q. Part-time work. What hours did you work?

A. The first, I think it was the first nine months I worked mornings from 8:00 o'clock until about 11:30.

Q. After that?

A. I worked afternoons and evenings.

Q. Now, did you attend school every day? [54]

A. Not every day.

Q. Did you attend school on Saturday?

A. No.

Q. Did you work?

A. I worked full time on Saturday.

Q. Did you work a full day on Saturday?

A. Yes.

Q. Did you work full time on any other occasions?

A. Yes. We would have holidays like Christmas time and we would have a week off and Thanksgiving, I think we had three or four days off, and I worked full time.

Q. Do you know about how many hours a week you averaged?

A. I checked my, I think it was, W-2 form they gave me, and it figured out just about 30 hours a week average.

Q. Were there other employees working part time, also? A. Yes.

Q. Did you ever talk to employees about join-

(Testimony of Thomas Frederick.)
ing the union, the AUW-AFL? A. Yes.

Q. When did you first do that?

A. After I contacted Mr. Pounds in October 1950.

Q. Now, over what period of time did you discuss the union with the other employees?

A. Over what period?

Q. Yes. [55]

A. From then until I was discharged, from October until December.

Q. Now, did you ever hand out any union cards to the employees? A. Yes.

Q. When was that? A. 27th.

Q. Of what month? A. Of December.

Q. Where did you hand them out to the employees? A. All through the plant.

Q. Did you collect any cards from employees?

A. Yes.

Q. Where? A. All through the plant.

Q. When?

A. 27th and the 28th of December.

Q. Do you know how many cards you collected?

A. 55.

Q. Were they signed cards?

A. Yes.

Q. Did anybody connected with the company see you pass out cards or receive cards?

A. Yes, Ed Gilly saw me pass out cards.

Q. Who is Ed Gilly? [56]

A. He is the foreman, general foreman of the plant.

(Testimony of Thomas Frederick.)

Q. Did you have any conversation with Mr. Gilly about it?

A. Well, the night of the 28th I jokingly asked him why he didn't sign a card.

Q. Did he say anything with respect to it?

A. No; he turned around and walked off.

Q. Did anybody else see you pass out any cards?

A. The management, you mean?

Q. Yes, connected with management.

A. Mrs. Nemec saw me pass out cards.

Q. Who is Mrs. Nemec.

A. Mr. Nemec's wife, Fred Nemec.

Q. Does she have any position in the plant?

A. Yes, bookkeeper.

Q. Where did she see you pass them out?

A. I was out behind the plant, I think the 27th, the night of the 27th after work.

Q. What time?

A. Approximately a quarter to 5:00.

Mr. Simpson: Will you keep your voice up, please? I can't hear you.

The Witness: I said approximately a quarter to 5:00 the 27th.

Q. (By Mr. Harrington): Who was present there?

A. Well, Bill Smith and Melvin Gervais and other members of [57] the plant.

Q. Where were you standing?

A. I was at the back gate, at the plant.

Q. Where was Mrs. Nemec?

(Testimony of Thomas Frederick.)

A. She was up inside the plant, one of the larger doors.

Q. Did she say anything to you?

A. No, she said nothing.

Q. How long did she watch you?

A. We were only there—the other shift had already gone on when I got out there. It was, I guess, about five minutes or so, maybe less.

Q. Now, you state that you ceased working there on December 28th? A. Yes.

Q. What happened in connection with that?

A. My discharge, you mean?

Q. Yes.

A. Oh, Ed Gilly, the man back there (indicating), came up to me and told me that Fred Nemec had been watching me and said I hadn't been cleaning my machines properly, and I was therefore laid off.

Q. Keep your voice up so we can hear you.

A. He said that Fred Nemec had been watching me and I hadn't been cleaning my machines properly, and he had to give me my check; he was sorry to see me go. [58]

Q. Was there anyone else present at that time?

A. No.

Q. Did you say anything to Mr. Gilly?

A. I tried——

Q. I want to know what you said, if anything.

A. I said something in connection with the union, trying to connect it. I don't recall exactly what I did say.

(Testimony of Thomas Frederick.)

Q. Did you say anything in connection with cleaning your machines.

A. Oh, yes, I did say that I hadn't been employed as an operator for some time, hadn't been doing setup and maintenance work; it wasn't my job to keep clean machines.

Q. Did he say anything about that?

A. He said, "All I know is what the old man told me."

Q. How long had it been since you worked as an operator on a machine?

A. It had been several months at that time, two or three months.

Q. Did you know a man named Clarence Leeper?

A. Yes.

Q. Did you ever give him a union card?

A. Immediately after I was discharged on the 28th.

Q. Where did you give it to him?

A. In the plant.

Q. What part of the plant? [59]

A. Oh, it was about 50 feet from the offices.

Q. What did he do with it?

A. He signed it.

Q. Did he give it back to you? A. Yes.

Q. Was anyone else present?

A. No, not right there. They did see him signing the card.

Q. Who did?

A. Mr. Robert Milliron, the night foreman, and I think Ray Nemec.

(Testimony of Thomas Frederick.)

Q. Who is Ray Nemec?

A. The son of Mr. Nemec.

Q. Where were they?

A. They were walking down the aisle from the office.

Q. Did they say anything to you or Mr. Leeper?

A. Said nothing; Ray Nemec turned around and walked back into the office.

Q. Now, did you, while you were working for the company, ever do any work on carbon parts?

A. Yes.

Q. When?

A. Different times. It wasn't a steady job. It was just maybe a day or two a week, or maybe three days a week. It wasn't any set time.

Q. What kind of work was that, working on carbon? [60] A. Very dirty.

Q. Did you ever complain about doing the work?

A. I made gripes, just like any man would do with something he didn't care to do.

Q. To whom did you make those gripes?

A. To Ed Gilly.

Q. What did you say in those gripes?

A. I asked him why he didn't put somebody else on it. I think I had had my share of it.

Q. What did he say to that?

A. Well, we were on pretty good terms and he just would joke to me, and I would go ahead and run it.

Q. Did other employees gripe about that type of work? A. Yes. In fact, one quit.

(Testimony of Thomas Frederick.)

Q. Did you continue doing that type of work, up until your discharge?

A. No. When they started this big boom on this project on Jato's units, they had to put a man full time on it.

Q. How long was that before your discharge?

A. I am not certain; approximately a month, I would say.

Q. Beg your pardon?

A. Approximately a month; I am not sure.

Q. Did you work on any carbons after that?

A. I think I did fill in a couple of times on the job, when they would get behind. [61]

Q. Now, on the day of your discharge, what type of work were you doing?

A. The day of my discharge I was helping set up a four-spindle automatic.

Q. Whom were you helping?

A. I think a man by the name of Healey; myself and one other fellow, I don't know his name. We were all working on it.

Q. Did you have any conversation with Mr. Gilly with respect to that machine?

A. Yes. After they got the tools set, and everything, I was to stay there and set the feeds on it. He told me exactly what set of gears to put on. I told him I had never put gears on that type of automatic and I hadn't.

He told me what gears to hunt up. We found the gears. He installed them, because I had never done it.

(Testimony of Thomas Frederick.)

Q. Who is "he"? A. Ed Gilly.

Q. He installed the gears? A. Yes.

Q. Did the machine work properly then?

A. No, it was excess feed. I don't know exactly what the feed was. It was too fast for the job.

Q. What happened?

A. The drill started pushing back in one of the holders. I tightened the drill holder down, to try to keep it from [62] pushing back, and the holder finally broke. It had been broken before, though.

Q. Where was it broken?

A. Right next to the weld. It was a cast-iron bushing and they always break next to the weld. It had been welded before.

Q. It broke next to where it had been welded before? A. Yes.

Q. Did you discuss that with Mr. Gilly?

A. Yes. We had a discussion on how to repair it.

Q. What was the discussion?

A. Well, he suggested just grinding it out and welding it. I had another suggestion, to put a set screw from the top, to make it a little more secure.

Q. What was done?

A. Well, I ground out the broken place so you could get a good weld in it, and tapped and drilled a hole in it, and took it to the welder to be welded.

Q. About what time of day was that?

A. I think it was late morning; early afternoon.

Q. Was the machine put in operation then?

(Testimony of Thomas Frederick.)

A. After the holder had been cooled. You have to cool it slowly, because of the cast iron. We put it in operation and slowed the feed down, and it worked properly.

Q. Did you do any more work on that machine that day?

A. No. After that I went to another job. [63]

Q. Who operated the machine?

A. Elmer Ur.

Q. Did you have anything more to do with that machine after that?

A. No.

Q. Now, what type of work did you do during the last three or four months of your employment?

A. Mostly maintenance and setup work.

Q. What did that consist of?

A. Setting tooling on machinery, and I think one of the last jobs I had there was building jigs from some Potter & Johnston, to hold the Jato tanks.

Q. What did the maintenance work consist of?

A. Repair machinery, like the tool holder that broke.

Q. Did any of that work include cleaning machines?

A. You do work on an engine lathe at times, that type of work. I was supposed to clean that, and I think I did.

Q. You did. Did you distribute any handbills around the plant?

A. Not openly. I did bring some from the out-

(Testimony of Thomas Frederick.)
side into the washroom and distributed them in the washroom.

Q. Whom did you distribute them to?

A. I don't know. New employees.

Q. New employees? A. Yes. [64]

Q. Before the time of your discharge, had you ever been told your work was unsatisfactory, by anybody connected with management?

A. I had made mistakes; I had never been told in those words.

Q. Had other employees made mistakes, also?

A. Everybody makes mistakes.

Q. Had Mr. Nemec ever said anything to you with respect to your work? A. Never.

Q. Or Mr. Martin?

A. Never anything detrimental, that I can recall.

Q. That is what I mean. Did any of them say anything about your work not being proper?

A. I heard something about—by hearsay—not cleaning a machine at one time. It must have been six months before I was operating. It was through Gilly, though; it wasn't through Mr. Nemec.

Q. Now, do you recall whether you did a repair job on a Potter & Johnston machine about a week before your dismissal?

A. I don't recall that. I had been working on the Potter & Johnston. It wasn't repair, it was setup. It might have been some repair that was connected with it, but I don't recall exactly what it was.

Q. Was it unusual for there to be a machine breakdown in the plant? [65]

(Testimony of Thomas Frederick.)

A. No, not at all unusual.

Q. How often did it happen?

A. At least one machine broke down almost every day; it is very common.

Q. Did you ever refuse to follow any directions or instructions given you by management?

A. Not that I recall.

Q. Did you ever refuse to perform any work that was assigned you? A. Never.

Q. Did you ever loaf at your work?

A. No. I think I worked pretty steady. I had my slack moments, like any other man. I don't work as hard sometimes as I do other times; more or less steady.

Q. Were you ever told by anybody connected with management you weren't working hard enough? A. Never.

Mr. Harrington: No further questions.

Cross Examination

Q. (By Mr Simpson): Mr. Frederick, you stated that you were laid off by the company at a time when work became slack. A. Yes.

Q. Do you recall when that was?

A. I don't know exactly when it was.

Q. Was that in October 1949? [66]

A. Might have been.

Q. You were off about ten days?

A. Approximately two weeks, as I recall.

Q. When was it that you began going to school and working part time?

(Testimony of Thomas Frederick.)

A. February of 1950.

Q. Was it about that time or shortly before that that you were married?

A. Just a minute. Now I recall, I think it was February of '49 I started school.

Q. You started in school in February of 1949?

A. Yes. I finished February of '51. It was two years.

Q. It was '49, then. This is 1952 now.

A. Yes, I know. I am pretty sure it was '49.

Q. When were you married?

A. I was married November 1950.

Q. Now, I take it that you attended school regularly except on Saturdays and during vacation periods when there wasn't any school? A. Yes.

Q. During the week when you were going to school, you worked part time at Nemec?

A. Yes.

Q. Those hours were what, those part-time hours?

A. When I first started to school I worked mornings from [67] 8:00 to 11:30.

Q. Classes were in the afternoon then?

A. That is right. Then in less than a year, I think it was about nine months, I started working afternoons and evenings. That was most all of 1950. In fact, all of 1950 was afternoons.

Q. To the best of your recollection, then, your average workweek, when you were working part time, was about 30 hours a week?

A. That was in 1950. I don't know prior to that.

(Testimony of Thomas Frederick.)

Q. In 1950? A. Yes.

Q. During the time that you worked part time, did you do a different kind of work from that which you had previously done?

A. Yes. I did operations, operated machinery, and then the last three or four months before I was discharged it was mostly setup and maintenance work; still some operation, some operating.

Q. Part of the work of one who works on operation and maintenance is to see that the machines are operating properly?

A. That is correct.

Q. And to oil them, if they need oiling?

A. No; not if you are on setup and maintenance, you don't necessarily oil machinery.

Q. You clean the machines?

A. Not the one you are setting up. [68]

Q. The ones that are set up, that you are maintaining, is that part of the job of the maintenance man, to keep the machines clean?

A. Well, it is not commonly done. If you are setting up a machine, it is supposed to be cleaned off before you start.

Q. What do you mean by "setting up"?

A. You set tooling and you make tools for the machine, to cut the work. It is just—just imagine it as a lathe, automatic machinery.

Q. Now, you stated, I believe, that the first time that you handed out any cards to union employees relative to—what were those cards, about having an election? A. The cards, you mean handbills?

(Testimony of Thomas Frederick.)

Q. No. You said you handed out some cards the first time on December 27th.

A. That was the authorization cards.

Q. What were the cards? What was on them?

A. Let's see now. It had the name of the union and it was to the effect that, "I give my permission, authorize the union to represent us in an election."

Q. Did it say anything about having an election?

A. Not about an election, but that is part of the procedure.

Q. Now, what hours of the day was it that you were working on the twenty-seventh, when you were handing out these cards?

A. I was working all day. That was Christmas vacation and [69] I wasn't attending school.

Q. You handed these out then while you were working at Nemec Engineers and did it in the plant on that day? A. That is right.

Q. How long did it take you to pass these cards around among the employees?

A. There wasn't any set time. All day long, off and on; I had to work the same time.

Q. In other words, while you were supposed to be working you were handing out cards on the company's premises, is that correct?

A. I was working at the time——

Q. You were being paid for working, in any event?

A. As I walked to get a drink or walked to the bathroom I would hand out cards. Men would approach me and I would be working. I was working

(Testimony of Thomas Frederick.)

almost constantly. The men would approach me most of the time.

Q. You don't know how long it took you to pass out these cards?

A. There wasn't any set time. I passed them out all day, the twenty-seventh and twenty-eighth, off and on, whenever I would be approached or I would approach somebody else.

Q. At the time you approached any of the employees and gave them cards, did you have any conversations with them?

A. Well, I must have said something, but very little, [70] because I was like a leper the last day and nobody would come around me. I didn't try to approach——

Q. What do you mean, nobody would come around you?

A. Other than just to hand me the card and sneak off; they were afraid.

Q. But you did talk to some of the employees at the time that you gave them cards?

A. I must have said something; I don't recall.

Q. Did you tell them what it was you were giving them?

A. Well, I had done all that previous to that; told them the advantages of the union.

Q. When you had done that previously, was that also on company time? A. Not entirely.

Q. It was while you were working there, wasn't it?

A. Yes, but during lunch hours and after work.

(Testimony of Thomas Frederick.)

Q. None of it during the time you were working or supposed to be working on the job?

A. Yes, I did sometimes when I was working.

Q. Did you go around and collect the cards from the men?

A. They either came to me or I collected; both ways.

Q. How many did you hand out altogether?

A. I gave several bunches of cards to several other fellows that were helping me.

Q. But you had them? [71]

A. I had them originally.

Q. How many did you have originally?

A. I would say approximately a hundred; I am not sure.

Q. You handed out about a hundred and you got back about 65? A. About 55.

Q. 55? A. Yes.

Q. You say that Mr. Gilly saw you passing out cards on the twenty-seventh? A. Yes.

Q. How do you know he saw you pass out cards?

A. I was handing a card to a fellow and he walked from here to this lady (indicating) from me, and immediately turned his back.

Q. That is about how far, about 15 feet?

A. I would say three feet.

Q. You mean this lady (indicating)? I thought you were pointing to the lady over against the wall. About three feet from the reporter? A. Yes.

Q. Did you show Mr. Gilly what was on the card you were passing out? A. No.

(Testimony of Thomas Frederick.)

Q. He didn't stop and read it?

A. No. He turned his back and acted like he didn't see it. [72]

Q. And just walked away?

A. That is right.

Q. Had you given Mr. Gilly a card to sign?

A. I hadn't given him one. I said jokingly—I jokingly asked him why he didn't sign a card.

Q. That was on the twenty-eighth?

A. Just before my discharge.

Q. He didn't say anything?

A. He didn't say a word.

Q. You didn't give Mr. Martin any card or pass any out in Mr. Martin's presence? A. No.

Q. Nor did you in the presence of Mr. Nemec?

A. I had been told they had been watching me.

Q. Don't tell me what somebody told you. Did you pass out any in his presence?

A. No, not that I know of.

Q. You mentioned an incident where you said—if my notes are correct—you were out behind the plant talking to Bill Smith and some others.

A. Mel Gervais.

Q. Was that during working hours or after working hours? A. No, after working hours.

Q. And Mrs. Nemec, you say, was in the office?

A. No. She was at the back door looking out.

Q. How far was she from you?

A. I would say a hundred feet or more.

Q. A hundred feet. What was it that you were handing out on that occasion?

(Testimony of Thomas Frederick.)

A. Handing handbills to the rest of the boys——

Q. Handbills or cards?

A. Cards were attached to the handbills.

Q. She couldn't see what was on these cards or handbills at a distance of a hundred feet?

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: Well, I think it is a permissible question. I will overrule the objection.

The Witness: No, I suppose she couldn't see from that distance.

Q. (By Mr. Simpson): She didn't say anything to you?

A. Nothing.

Q. She just looked at you and the other men there and watched you for a while, and went back in the office, is that it?

A. That is what she did.

Q. Now, what date was it that you had this conversation with Mr. Gilly about picking up your check? Was that the twenty-seventh or the twenty-eighth?

A. Picking up my check—you mean when he handed me my check?

Q. Oh, did he hand it to you? [74]

A. Yes.

Q. Was that the twenty-seventh or the twenty-eighth? A. Twenty-eighth.

Q. Mr. Gilly told you at that time that Mr. Fred Nemec had been watching your work and that you were not cleaning the machinery properly?

A. That is right.

(Testimony of Thomas Frederick.)

Q. And that they were sorry, they would have to let you go, "Here is your check"?

A. That is right.

Q. That is all the conversation you had at that time?

A. That is all—no, I tried to prod him about the union.

Q. What did you say?

A. I don't know exactly what I did say. I was trying to make some connection with my firing with the union. I knew it accomplished nothing.

Q. In other words, you were trying to tell Mr. Gilly that the reason you were being let out was because of something in connection with the union, is that what you mean?

A. Let's see. I think maybe I can recall the exact words. I said I knew, said something to him, "You know that isn't right, Ed."

He said "Al I know is what the old man told me."

That is about the deal.

Q. Mr. Gilly did not tell you you were being let out because [75] of anything you had done in connection with union activities? A. No.

Q. But you were trying to get him to say that?

A. That is right.

Q. Have you told us all that you said at that that time?

A. There was very little conversation.

Q. Before you had this conversation with Mr. Gilly on the twenty-eighth, had anything been said

(Testimony of Thomas Frederick.)

to you by him or Mr. Martin, or Mr. Nemec, about your not cleaning the machine?

A. That is Fred's main gripe, is keeping the machines clean. I think everybody in the plant had been told that once or twice.

Q. That is one of his main projects, to see that all the machines are kept clean in the plant?

A. They are all there, but a lot of them are not kept clean.

Q. That is what Mr. Nemec insists on, that the machines be kept clean?

A. I wouldn't say that he insisted on it. I would say he kept harping on it.

Q. He kept talking about it all the time?

A. Not all the time.

Q. How frequently?

A. I don't think I had been told for several months.

Q. You knew they wanted the machines kept clean?

Mr. Harrington: I object to that.

Trial Examiner Royster: Overruled. Go ahead.

The Witness: I would say yes.

Q. (By Mr. Simpson): Now, you were working on these carbon parts for how long?

A. I don't know exactly. It was a part-time job; maybe a few days a week. Maybe I wouldn't work on them for two weeks and have another two or three days, and maybe a week at a time; different lengths of time, nothing definite.

Q. Did you ever tell Mr. Gilly you weren't go-

(Testimony of Thomas Frederick.)

ing to work on them any more? A. Never.

Q. What did you tell him about it?

A. I griped about it and told him I didn't like the job.

Q. You didn't like working on carbons?

A. That is right.

Q. And to get somebody else to do it?

A. I might have said that; give somebody else a chance to eat some of that dust. It was very dirty.

Q. Were you taken off the carbons?

A. Yes, I was taken off. They had a man full time on it, a month or so.

Q. This other man came on and did the work on the carbons after you were taken off?

A. Yes. It was necessary because—to increase production. I was only working part time and he was a full-time employee.

Q. Is that when you went to work setup and maintenance? [77]

A. No. I was working setup and maintenance all the time. I was doing this carbon. It was just temporary.

Q. Now, this incident about—what was it, a tool holder that was broken that you said had been previously welded? A. That is right.

Q. That occurred on the day of your discharge?

A. Yes.

Q. Describe the tool holder that broke at that time.

A. It is a round bushing with a flat bottom on it, and it is split. It is tightened down at one side with

(Testimony of Thomas Frederick.)

two bolts. It broke on the back side exactly opposite the slot where it would be tightened down. It had been broken. On this occasion it broke right next to the weld, which happens when you weld a piece of cast iron, put strain on it; it breaks right next to the weld.

Q. Had any instructions been given you by Mr. Gilly or anyone else as to how that tool holder should be installed?

A. There is only one way to install it. You mean repair?

Q. Yes.

A. Mr. Gilly and myself had a discussion about it. We came to an agreement how it should be done; use partly my way. The other way—it was obvious it had to be done.

Q. Before it had been broken were any instructions given to you by Mr. Gilly about this tool holder?

A. Not that I recall. [78]

Q. Did you use a hammer on that tool holder on those occasions?

A. No, I couldn't see the necessity of it.

Q. Did you?

Trial Examiner Royster: Did you?

The Witness: No.

Q. (By Mr. Simpson): Is it your testimony that the tool holder did not break, as a result of hammering? A. Very definitely not.

Q. You mentioned that you had distributed handbills under cover in the washroom.

(Testimony of Thomas Frederick.)

A. That is right.

Q. You didn't want anybody connected with management to see you distribute them, is that it?

A. That is correct.

Q. So while you were working or supposed to be working and drawing your pay, you were out in the washroom handing out handbills to other employees?

A. That is incorrect. It was after hours I would do it.

Q. After hours?

A. Either that or in the morning.

Q. Before you went to work? A. Yes.

Q. But this washroom was located on the company premises?

A. That is correct. [79]

Q. Is it your testimony that before you were discharged you were not told at any time by Mr. Gilly, Mr. Martin or Mr. Nemec that your work was not satisfactory?

A. I can't recall any specific incidents. Everybody in the plant that worked there that long must have done something wrong and been told about it. I would say I didn't.

Q. Do you have any recollection whatsoever, Mr. Frederick, about working on the Potter & Johnston machine about the time of your discharge, or shortly prior thereto?

A. Yes. I was working on the Potter & Johnston.

Q. Was that a repair job? A. No; setup.

(Testimony of Thomas Frederick.)

Q. Setup?

A. Yes. Might have been some repair connected, like I said before, but I don't recall exactly.

Q. Was anyone else working on it with you?

A. Yes, two or three other fellows.

Q. Were you using the sledge hammer on that machine at that time? A. I don't recall.

Q. You wouldn't say whether you were or weren't, is that it?

A. I don't know where I would use it, I would say that.

Q. Just give me your best recollection as to whether you did or didn't.

A. I don't recall using it. [80]

Q. Did anyone else there use one, a sledge hammer on that machine?

A. They might have; I am not sure.

Q. In your presence?

A. Not that I recall.

* * * * * [81]

Q. (By Mr. Simpson): I show you a card which is a postcard with an address to the International Union, United Automobile Workers of America, A.F.L., and on the reverse side is an authorization for representation. Are those part of the cards you were passing out at Nemec?

A. Cards just like that.

Q. Containing the same information?

A. Yes.

Mr. Simpson: I offer this in evidence, Mr. Trial Examiner, as Respondent's——

(Testimony of Thomas Frederick.)

Trial Examiner Royster: That will be Respondent's Exhibit 1. Is there objection to its receipt?

Mr. Harrington: I have no objection to its receipt.

Trial Examiner Royster: It is received.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 and was received in evidence.)

RESPONDENT'S EXHIBIT No. 1

AUTHORIZATION FOR REPRESENTATION
UAW-AFL

I, the undersigned employee of...............
Company. City............... State...............
hereby authorize the UAW-AFL, its officers and/or agents to represent me in collective bargaining with my employer in all matters pertaining to wages, hours of employment and other conditions of employment in accordance with provisions of the National Labor Relations Act, as amended.

Name (Print) ....
Address .... City..............
Dept........... Date.......... Phone...........
Signature........................

Trial Examiner Royster: Do you have another one of these, [84] Mr. Simpson?

Mr. Simpson: No, I do not. Perhaps the union or General Counsel has. You need an additional copy?

(Testimony of Thomas Frederick.)

Trial Examiner Royster: You are supposed to have them in duplicate.

Mr. Simpson: I will see if I have any.

Trial Examiner Royster: We will go along now and maybe one will turn up.

Q. (By Mr. Simpson): I show you a, I guess you would call it, blue mimeographed sheet of paper, headed "Beat the Wage Freeze," and I will ask you if that is one of the papers that you handed out while you were working at Nemec.

For further identification, it bears the date in the lower right-hand corner of 12/14/50.

A. 12/14/50. I don't recall that bill; might have——

Q. You don't recall whether you did or didn't pass this out?

A. No, I don't.

Q. I show you another mimeographed sheet headed "UAW-AFL Benefits," with a date in the lower right-hand corner of 1/19/51, and I will ask you if this is one of the posters you handed around at Nemec's.

Trial Examiner Royster: During his employment, Mr. Simpson?

Mr. Simpson: No. He left there in December. If this date is correct, it would have been in January. [85]

The Witness: Yes.

Q. (By Mr. Simpson): This is one?

A. Yes, as I recall.

Mr. Simpson: I offer this in evidence.

(Testimony of Thomas Frederick.)

Trial Examiner Royster: That will be Respondent's Exhibit 2. Is there objection?

Mr. Harrington: No objection.

Trial Examiner Royster: It is received.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 2 and was received in evidence.)

RESPONDENT'S EXHIBIT No. 2

UAW-AFL BENEFITS!

The UAW-AFL Guarantees Nemec Employees

1. Higher wages for all regardless of classification.
2. Excellent insurance plan covering all employees on or off the job, with the entire cost paid for by the Company.
3. An insurance plan available for Nemec employee's families at a very low rate. However, employees will not be required to take this insurance unless desired.
4. Establish a Safety Committee to achieve and maintain safe and sanitary working conditions.
5. Establish real job security. Employees will be upgraded and laid off according to seniority.
6. Paid vacations.
7. Six Paid Holidays a year.
8. Premium pay for night work.
9. No dues will be paid until after the contract is signed and Nemec employees have received their wage increases.

(Testimony of Thomas Frederick.)

10. Officers and Committeemen will be elected by Nemec employees.
11. A resident Union Representative to assist your local when the membership requires assistance.

Meeting at 8:00 p.m., Monday, January 22nd
11544 E. Whittier Blvd.

Come One | Come All

Refreshments Will Be Served!

mt afl | 1-19-51 4:30 p.m.

Q. (By Mr. Simpson): Do you recall an employee working at Nemec by the name of Russ?

A. I recall the name. I can't place the face.

Q. You recall Mr. Russ also handed out cards similar to Respondent's Exhibit 1?

A. He was the man that ran the magnaflux machine. You recall that?

Q. Yes. A. Yes, he was helping me.

Q. He did hand them out, as I understood you to say? A. Yes, he helped.

Q. You knew a Mr. Bagley, who was employed there? A. Yes.

Q. Mr. Bagley circulated these cards, similar to Exhibit 1?

A. I don't recall him circulating anything. He might have. [86] I had quite a few men in there helping me.

Q. You recall he was quite outspoken, saying he was in favor of unions?

Mr. Harrington: I object——

(Testimony of Thomas Frederick.)

The Witness: Yes.

Mr. Harrington: ——to that characterization, Mr. Examiner.

Trial Examiner Royster: I will let it stand. The answer may remain.

Q. (By Mr. Simpson): What other men did you have helping you pass out cards, such as Exhibit 1?

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: I overrule the objection.

The Witness: I don't recall exactly the names. I had several men working with me.

Q. (By Mr. Simpson): Three, four, five, would that constitute "several"?

A. At least three or four or five?

Q. Do you recall Mr. Bellheimer?

A. Yes.

Q. Did he help you pass out these cards?

A. Well now, you mean help—do you mean——

Q. Did you give them to him and ask him to pass them around?

A. I think I gave everybody probably one or two cards. They were supposed to pass them to others, if they didn't have [87] one.

Q. Do you recall Mr. Bellheimer stating he was very much in favor of the union?

A. I do.

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: I will let the answer remain.

(Testimony of Thomas Frederick.)

Q. (By Mr. Simpson): Do you recall a Mr. Young employed there? A. No, I don't.

Q. Mr. Hunt? A. Yes.

Q. Did he help you pass out these cards or do so at your request? A. Yes, he did.

Q. Mr. Spurlin, did he also help pass out the cards at your request?

A. Spurlin? I can't place the face.

Q. You don't recall him? A. No.

Q. How long did it take you to set up this Potter & Johnston machine?

A. Well now, I wouldn't say me. I was only working part time on it. They had two or three other employees working full time on it. I was more or less helping.

Q. How long were you and the other men employed in setting [88] up the machine?

Mr. Harrington: I object to that unless the question means how long were the other men working there that the witness was there.

Mr. Simpson: That is correct. He wouldn't know how long they were working if he wasn't there.

Trial Examiner Royster: Does that satisfy your objection?

Mr. Harrington: Yes, that satisfies it.

The Witness: I don't recall how long it did take.

Q. (By Mr. Simpson): Was it a matter of a few hours or several days?

A. No, it was over a week.

Q. Over a week? A. Yes.

Q. Was that all setup or was that repair work?

(Testimony of Thomas Frederick.)

A. Mostly setup. There might have been some repair on it; there usually is, sometimes is.

Q. These other men working with you, in setting up that Potter & Johnston machine, were they part-time employees or full time?

A. Full time.

Q. Do you know what they did about working on that machine when you weren't working there?

A. Yes, I could see when I came in at night about what they had accomplished. [89]

Q. You could tell whether they had or hadn't been working on the machine? A. Yes.

Q. Had they been?

A. Yes, I would say they had. Whether they worked steady or not I don't know.

Q. You don't know? A. No.

Mr. Simpson: No further questions.

Redirect Examination

Q. (By Mr. Harrington): Mr. Frederick, did you hand out these union cards openly in the plant?

A. I wouldn't say it was exactly openly. It was open so far as the men were concerned; not management.

Q. What do you mean by that? How did you hand them out?

A. I more or less handed them out on the sly, trying to keep the other men protected.

Q. When you asked Mr. Gilly, on this occasion that you did ask Mr. Gilly about signing the card, did you tell him what kind of card it was?

(Testimony of Thomas Frederick.)

A. No. I said, "union card."

Q. You said, "union card"? A. Yes.

Q. You testified you also handed out handbills.

A. Yes. [90]

Q. Where did you hand them out?

A. In the washroom after work.

Q. Did you hand any out at the gate?

A. Yes, I handed them at the gate, too.

Q. Whom did you hand them out to at the gate?

A. Is this before my discharge or after?

Q. Before. A. Before my discharge?

Q. Yes. A. I don't recall.

Q. Do you recall whether or not you ever handed any out to Mr. Gilly?

A. I don't think I did, no.

Q. Now, the day you were discharged, did you tell Mr. Gilly how long it had been since you had worked as an operator?

A. No. No, I don't think I did. Maybe. I am a little mixed up on that.

Q. You recall the conversation that I mean, the day that Mr. Gilly told you you were discharged? He gave you your check and told you you were discharged.

A. I recall parts of it. I don't recall it in its entirety.

Q. What do you recall about it?

A. I recall he said the old man had been watching me. He put it in those words. I hadn't been keeping my machine clean; therefore, I was discharged. [91]

(Testimony of Thomas Frederick.)

Q. What did you say?

A. I say something about, "You know that isn't right, Ed."

Mr. Simpson: I couldn't hear you.

The Witness: I said, "You know that isn't right, Ed."

Q. (By Mr. Harrington): Did you say anything more that you can remember?

A. Then he said something about, "All I know is what the old man told me."

Q. Now then, my question was whether or not you said anything to him about how long it had been since you had worked as an operator.

A. I didn't get that.

Q. How long had it been since you had worked as an operator?

A. I don't believe I did; I don't recall.

Q. You don't think you did. Now, what was the setup on this Potter & Johnston job?

A. It was setting up the Jato tank, to bore a hole on it, over another hole, located on another Potter & Johnston.

Q. How many employees worked on it?

A. I would say three or four, or five at times; different men.

Q. Was it the same employees that worked on it all during the several days it took to set it up?

A. Two or three of them were the same. The welders might have changed. We did quite a bit of welding on that. [92]

(Testimony of Thomas Frederick.)

Q. Now, you remember testifying as to Mr. Bagley? A. In what way?

Q. You were asked a question, I believe, whether or not Mr. Bagley handed out cards.

A. I don't remember.

Q. You don't remember? A. No.

Mr. Harrington: I have no further questions, Mr. Examiner.

Recross Examination

Q. (By Mr. Simpson): Mr. Frederick, the handing out of these handbills, except the ones you handed out in the washroom, wasn't that done by you after you had been discharged, when you handed them out at the gate? A. You say all?

Q. No, no. Aside from those you have testified you handed out in the washroom, this handing you did at the gate, wasn't that after you had been discharged?

A. No. I handed them once before for just a short time. I got a bunch from one of the men and handed them to some other fellows.

Q. Can you tell us what day that was?

A. I don't know, sir. It was before I was discharged.

Q. Did you ever see a bulletin posted in the plant about always keeping your machine clean?

A. I don't know. There was quite a few posters around; I don't recall.

Q. Do you recall they had a five-minute bell they rang each shift, which was to allow time for cleaning up the machines? A. I do.

(Testimony of Thomas Frederick.)

Q. Before you went off shift? A. Yes.

Q. That was the practice, wasn't it? A. Yes.

Mr. Simpson: That is all.

Redirect Examination

Q. (By Mr. Harrington): What type of employees had machines to clean?

A. I would say all employees have machines to clean at some time, except the helpers; they might not have.

Q. Would a setup man have a machine to clean?

A. Ordinarily they wouldn't, unless you are working on an engine lathe. Then you are supposed to brush chips off when you get through.

Q. Does a maintenance man have machines to clean?

A. No, unless he was using an engine lathe or something.

Mr. Harrington: I have no further questions.

Mr. Simpson: That is all.

Q. (By Trial Examiner Royster): Mr. Frederick, you testified to an occasion when you were passing out something in the rear [94] of the plant and Mrs. Nemec saw you. What date was that?

A. That was before my discharge. I think it was —one of the first handbills.

Q. You say it was before your discharge?

A. Yes.

Q. Can you approximate the length of time before your discharge that that occasion took place? Was it a matter of a day or two? A. Oh, no.

Q. A week or a month? A. A week.

(Testimony of Thomas Frederick.)

Q. More than a week, you would say?

A. Yes.

Trial Examiner Royster: Anything further?

Mr. Simpson: No.

Trial Examiner Royster: That is all.

(Witness excused.)

Mr. Harrington: Mrs. Leeper.

LUCILLE LEEPER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Harrington): Give your name and address to the reporter.

A. Lucille Leeper. 9326 Shady Lane, Rivera.

Q. What was your husband's name?

A. Clarence Leeper.

Q. Is he now deceased? A. Yes.

Q. When did he die? A. June 10th.

Q. Of what year? A. 1950.

Trial Examiner Royster: It must have been 1951.

The Witness: '51.

Q. (By Mr. Harrington): Was he employed by Nemec Combustion Engineers? A. Yes, sir.

Q. When was he employed by them?

A. It was October 16th.

Q. Of what year?

A. That would be 1950.

(Testimony of Lucille Leeper.)

Q. How long did he continue to work there?

A. He continued to work from October 16th until December.

Q. What was his classification?

A. A welder.

Q. How much experience had he had as a welder?

A. He had had 22 years' experience as a welder.

Q. Did you have any conversation with Mr. Nemec with respect to your husband's work in the plant? [96]

A. Yes, Mr. Nemec came to our house.

Q. When.

A. It was on the twenty-eighth of December.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. What time of the day was that?

A. It was in the afternoon and it was, oh, around 4:00 o'clock.

Q. Was anybody else present?

A. My daughter, my 16-year-old daughter.

Q. What was the conversation?

A. Well, he rang the doorbell and I went to the door, and he had Clarence's check in his hand. He wanted to know if Mr. Leeper was home.

I said, "No, he has gone to work."

His son with with him.

Q. Did he say anything when you said Mr. Leeper had gone to work?

A. He said he wanted to see Mr. Leeper, that he had Mr. Leeper's check, and he handed me Mr.

(Testimony of Lucille Leeper.)

Leeper's check at first. When he found Mr. Leeper had left, he took the check back.

Q. Did he say anything about whether or not Mr. Leeper was still an employee of the company?

A. He said that Mr. Leeper was a troublemaker and that he couldn't have Mr. Leeper in the shop any longer, although he [97] was one of the best welders he ever had. His intentions was to make him a foreman, but he was a troublemaker and an antagonizer and he couldn't have Mr. Leeper there.

Q. Did he say anything else, that you can recall? To refresh your recollection, do you remember whether or not he said anything about discharging Mr. Leeper?

A. He said he couldn't have Mr. Leeper at the plant because he was a troublemaker.

Q. Was there anything more in that conversation or is that all of it you can remember? Is that all you can remember?

A. I can't hardly think real well; I am not very good at this.

Q. As I understood you to say, Mr. Leeper had already left for work?

A. Mr. Leeper had already left for work. He had his lunch and had gone to work. I never dreamed there was anything wrong at all. I mean, so far as Mr. Leeper was concerned.

Q. Now, when Mr. Leeper came home from work that morning, he was working a night shift, was he not? A. Working a night shift.

Q. When he came home from work that morn-

(Testimony of Lucille Leeper.)

ing, did he bring his hood with him or his gloves?

A. You mean after he left on the twenty-seventh, to come home on the twenty-eighth?

Q. Yes. [98] A. No, he didn't.

Q. Did he bring any of his tools home with him?

A. Not a thing.

Q. Now, did you and your husband ever go back to the plant? A. Yes.

Q. When?

A. When we went back on Tuesday——

Q. What date would that be, do you recall?

A. That would be, oh—there was the first—I don't know exactly the date, but I think that would be about the second.

Q. Was it the following Tuesday?

A. The following Tuesday we went back. I packed by husband's lunch, ready to go to work. I drove over because I wanted to use the car, and he went in, but Mr. Nemec wouldn't let him go to work.

Mr. Simpson: Did you stay outside and did he go in, is that the point?

Mr. Harrington: That is what I am going to ask.

Mr. Simpson: We move that any testimony about going to work be stricken.

Trial Examiner Royster: I will let it go out.

Q. (By Mr. Harrington): Did you go in the plant with him? A. No; I was in the car.

Q. When he came out of the plant, what did he say? A. He had—— [99]

Mr. Simpson: Objected to ask calling for hearsay.

(Testimony of Lucille Leeper.)

Trial Examiner Royster: Sustained.

Mr. Harrington: I submit this is part of the res gestae.

Mr. Simpson: I don't see any res gestae to it.

Trial Examiner Royster: Sustained.

Q. (By Mr. Harrington): Did Mr. Leeper have anything with him?

A. He had a check for four hours' call-in pay, and his welding hood and his tools.

Q. Now, did Mr. Leeper ever call the plant after that? A. He did. He called the plant.

Q. When?

A. On the following day that he went in and they gave him his four-hour check. He called the plant to see, because he couldn't understand why they wouldn't let him go to work.

Mr. Simpson: I move that be stricken out as a conclusion of the witness.

Trial Examiner Royster: It may be stricken.

Q. (By Mr. Harrington): Were you with him when he called? A. Yes.

Q. Where did he call from?

A. A filling station on Anaheim-Telegraph Road; we stopped to get gas.

Q. In a phone booth? A. Yes. [100]

Q. Were you near the phone booth?

A. I was right at the phone booth when he called.

Q. Did you hear the conversation? A. Yes.

Q. What did he say?

A. He wanted a definite answer——

(Testimony of Lucille Leeper.)

Q. What did he say?

A. He wanted to know why he couldn't go to work. He wanted to know why they were leaving him go, because they wouldn't give him an answer as to why, and he wanted to know why.

Q. Did he say who he was talking to?

A. When the phone rang the office girl answered. He asked for Mr. Nemec and Mr. Nemec wasn't there, and Mrs. Nemec answered, because he said "Mrs. Nemec."

Q. What else did he say?

A. He just asked why he was being let go. And something was said on the other end about the union, because Clarence answered this——

Mr. Simpson: We ask that be stricken as being entirely hearsay and a conclusion of the witness.

Trial Examiner Royster: It may be stricken. Tell us what you heard, not your conclusions.

The Witness: Clarence said, "The union? What has the union got to do with it?" He said, "I will be to the union meeting tonight and find out." Whatever Mrs. Nemec said had [101] something to do with the union.

Trial Examiner Royster: That is your conclusion. That goes out.

The Witness: I am telling you what I heard.

Trial Examiner Royster: You are telling us also what you thought.

Q. (By Mr. Harrington): What else did Mr. Nemec say?

Mr. Simpson: Mr. Nemec?

(Testimony of Lucille Leeper.)

Mr. Harrington: I mean Mr. Leeper.

The Witness: Well, he hung up the phone and he said well, he was fired——

Mr. Simpson: I object to this and move it be stricken as hearsay.

The Witness: ——on account of the union.

Trial Examiner Royster: What she heard her husband say to her?

Mr. Simpson: She is not relating what she heard on the phone, but after he hung up the phone he turned around and said that.

Trial Examiner Royster: I will sustain the objection.

Q. (By Mr. Harrington): Was there anything else said in that phone conversation? A. No.

Mr. Harrington: May these be marked for identification?

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 2 and 3 for identification.) [102]

Q. (By Mr. Harrington): I show you a document, Mrs. Leeper, I have marked as General Counsel's Exhibit 2, and ask you what that document is.

A. This is the check that Mr. Nemec had when he came to the house and handed me, and then he took it back because he said he would see Clarence at the plant and give it to Clarence.

Q. Where did you get it then?

A. Where did I get it?

Q. Yes.

(Testimony of Lucille Leeper.)

A. Well, Clarence brought it home.

Mr. Harrington: I offer General Counsel's Exhibit 2 for identification in evidence.

Trial Examiner Royster: Is there objection?

Mr. Simpson: No.

Trial Examiner Royster: It is received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2

VOUCHER

Date: 12/27/50

Compensation Record and Receipt for Deductions for Clarence Leeper 3 from 12/21/50 to 12/27/50 incl.

22½ St. Hrs. at 1.85		41.62
6½ O.T. Hrs. at 2.77½		18.04
Total Compensation		59.66
Soc. Sec.	.89	
Calif. Tax	.60	
Withholding	3.80	
Total Deductions		5.29
Net Compensation		54.37

Employment terminated

Nemec Combustion Engineers

/s/ By B. L. Nemec

Detach and retain for your personal record

(Testimony of Lucille Leeper.)

Q. (By Mr. Harrington): I show you a document I have had marked as General Counsel's Exhibit 3, and ask you what that document is.

A. Well, this is the check that they gave Clarence when he went in on Tuesday. It is marked "Call-in Pay," and when he come out of the plant he handed me this check that they had given him; that was on Tuesday.

Mr. Harrington: I offer General Counsel's Exhibit 3 for [103] identification in evidence.

Trial Examiner Royster: Is there any objection?

Mr. Simpson: That isn't a check, is it, counsel?

Mr. Harrington: Beg pardon?

Mr. Simpson: Is that a check?

Trial Examiner Royster: It is a voucher, attachment.

Mr. Simpson: Apparently what is attached to a check. It isn't payable to anybody or drawn on any bank. I wouldn't think it would be a check.

Trial Examiner Royster: Is there any objection?

Mr. Simpson: No, I have no objection.

Trial Examiner Royster: It is received.

(The document heretofore marked General Counsel's Exhibit 3 for identification was rereceived in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 3

VOUCHER

Date: 12/28/50

Compensation Record and Receipt for Deductions for Clarence Leeper 3 from 12/28/50 to only incl.

4* St. Hrs. at 1.85		7.40
Total Compensation		7.40
Soc. Sec.	.11	
Calif. Tax	.07	
Withholding	none	
Total Deductions		.18
Net Compensation		7.22

Employment terminated.

Nemec Combustion Engineers
/s/ By B. L. Nemec

* Call in pay.

Detach and retain for your personal record

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* * * * * [104]

Q. (By Mr. Harrington): Do you have any children, Mrs. Leeper? A. Yes, I do.

Mr. Simpson: I object to that as immaterial.

Mr. Harrington: Why I am asking this I will explain to the Examiner. In case the Board or the Trial Examiner would find a violation here and di-

(Testimony of Lucille Leeper.)
rect a remedy, I would want to ask that the Trial Examiner and the Board, if there is any back pay involved, they will order it paid to this lady. That is within the power of the Board, in order to effecuate the policies of the Act.

Trial Examiner Royster: You understand it would have to go to the person, the representative——

Mr. Simpson: If there was any representative. I will state this: Of course, I don't know how far the Probate Code section goes, whether it includes salary awards or not. It depends on whether the estate exceeds a certain value and it can be obtained by the execution of a proper affidavit.

Mr. Harrington: The Board isn't required to follow any state procedure in these matters. The Board can direct the back pay to whomever it wishes, as long as it effectuates the [106] policies of the Act.

Trial Examiner Royster: How can it effectuate the policies of the Act, to pay it to anyone other than the person that has suffered by reason of the discrimination, and absent him whatever representative——

Mr. Harrington: This lady and whatever minor children she has have suffered by any discrimination. The only way the statutes can be restored is to give it to her, in as much as it can be restored. But it can't be fully restored, because there can't be any reinstatement.

(Testimony of Lucille Leeper.)

Trial Examiner Royster: You can present that as an offer of proof.

Mr. Simpson: Why don't you ask if there is a representative.

Q. (By Mr. Harrington): Is there any personal representative of Mr. Leeper, or does he have an estate? A. No.

Q. How many children do you have?

A. I have one 16-year-old daughter.

Q. Do you have any other children?

A. I have a married daughter. I only have the one minor child.

Q. Is that minor child living with you?

A. Yes.

Q. Are you supporting that minor child?

A. Yes. [107]

Mr. Harrington: I believe, although I haven't checked the point on it, Mr. Examiner, that the Brown Shoe Company case, which was a case involving a company that had gone into receivership, that the court stated that the Board had full, complete control over how back pay was to be paid and to whom it was to be paid.

Trial Examiner Royster: It couldn't be that broad. It certainly couldn't have the Board awarding back pay to some intermediary individual, because the person——

Mr. Harrington: The Board is charged with effectuating a public policy, and the Board can determine how that is to be effectuated, whether the back pay is to go to the person discriminated against or

(Testimony of Lucille Leeper.)
his next of kin or personal representative or to the administrator or executor of an estate; it is within the Board's discretion.

I was asking these questions in order to get that information in the record, in case the Board wishes to so exercise its discretion.

Trial Examiner Royster: You have your answers in now.

Mr. Harrington: Yes.

Trial Examiner Royster: Anything else?

Mr. Harrington: No, except I would ask the Trial Examiner and the Board, if they frame an order for back pay in this case with respect to Mr. Leeper, to frame it with the payments to be made to Mrs. Leeper. [108]

That is all I have. No further questions.

Trial Examiner Royster: All right. Anything further?

Mr. Simpson: No.

Trial Examiner Royster: I have a question or two, I believe.

Q. (By Trial Examiner Royster): Had you seen any of your husband's paychecks before this occasion on December 28th, when Mr. Nemec came to your house?

A. I cashed every one of them.

Q. How did you receive them? From whom did you receive them?

A. Mr. Leeper would bring them home and I aldays cashed the paychecks.

(Testimony of Lucille Leeper.)

Q. Did he bring them home on a certain day each week, or was it different days?

A. I think the payroll ending was every two weeks.

Q. Every two weeks?

A. Every two weeks.

Q. That is your recollection, at any rate; about every two weeks you got a check from Mr. Leeper?

A. Well, that was to start with, and then when he—he was paid every week, paycheck every week. When he worked for Rotary Oil Tool it was every two weeks.

Q. I am speaking of Nemec.

A. No. He got paid every week by Mr. Nemec.

Q. On any other occasion had Mr. Nemec come to your house [109] and delivered a check to you?

A. No, I never did see Mr. Nemec before. I wouldn't have known who he was hadn't I asked. I asked who he was.

Trial Examiner Royster: That is all.

(Witness excused.)

Mr. Harrington: The General Counsel rests.

Mr. Simpson: At this time, on behalf of the respondent, we move that the charges be dismissed and the complaint dismissed, upon the grounds there is no sufficient proof to sustain the allegations made.

It resolves into three charges, as I understand the charge made. One having to do with the discharge for union activities of Mr. Frederick. No. 2 having to do with the discharge of Mr. Leeper for union

activities. And No. 3 having to do with the claim that promises of benefit were made to the employees if they would vote against the union.

Let's take them in reverse order. As to the third charge of promises of benefit, there is no evidence whatsoever in the record that the company at any time made any promise to any employee that if he would vote against the union, that he would receive a benefit. The only witnesses who were asked about that were Mr. Snodgrass and Mr. Kuns. Both said they were told they were free to vote any way they sought or desired concerning the union election.

Mr. Kuns said he was told by Mr. Martin that the union [110] demands were such that they could not meet those demands competitively and give wage increases, which was part of their policy. If the company made more money, it was passed on to the employees. If they had to pay more than they could afford, they naturally couldn't afford to give increases. That certainly is not promising any benefits. In fact, the witness said he figured it was none of Mr. Martin's business what he did about the unions and it was not his business how Mr. Martin felt about it.

The other witness was equally clear. He said there was nothing said about unions at all.

Going to the question of Mr. Leeper's discharge or alleged discharge, the only direct testimony in the record is that given by the witness Snodgrass, who testified that Mr. Leeper stated if the demands he was making for a shift bonus and for lunch period pay were not meant that he was quitting. He

would give him 24 hours to tell him whether they would meet those demands or whether they wouldn't. He didn't return to work after that.

There is certainly no evidence whatsoever in the record to sustain by inference, suspicion or otherwise those two charges that have been made or proven by any evidence.

That gets us to the question of Mr. Frederick. The only thing about Mr. Frederick's evidence is that it would be necessary to engage in conjecture or inference or suspicion, that [111] the reason he was discharged was because he was passing out cards, such as are introduced here in evidence.

He said that nothing was said to him about union activities having anything to do with the cause of his discharge, but it was failure to keep his machine clean. That he attempted to bait Mr. Gilly into conversation concerning the union having some connection with his discharge, but he was unsuccessful.

So, upon the grounds that the evidence is clearly insufficient to support the charges, we move that they be dismissed.

Trial Examiner Royster: What do you say about the promise of benefit if they would forsake the union?

Mr. Harrington: I think that was a promise of benefit. It is, "If the union gets in we won't be able to give you wage increases. We won't be able to get contracts in competion with other firms."

Trial Examiner Royster: As I recall, they

couldn't pay the union scale and compete successfully.

Mr. Harrington: That is a promise of benefit. "If you don't join the union, if I don't have to pay the union scale, I will take care of you." He testified, "If you work for the company the company will work for you."

I think on this state of the record there is enough in there to require a denial of any motion to dismiss. [112]

Trial Examiner Royster: I will grant the motion to dismiss the 8 (1) allegation in the complaint, and denied to Frederick and Leeper.

Mr. Harrington: May I have an exception to that?

Trial Examiner Royster: You have an automatic exception.

Mr. Harrington: If I could argue that a little.

Trial Examiner Royster: Go ahead.

Mr. Harrington: I would like to argue the fact that the Act and Rules and Regulations provide that the Trial Examiner will make his rulings on the record as a whole. Certainly, this record isn't finished now and until the entire record is in I would think it it improper to make a ruling of that nature at this time.

I would like to call the Trial Examiner's attention to one case, and the name of it escapes me. I think it is the Penroid case. At the end of the case, when the Board attorney was making his closing argument, the Trial Examiner pointed out the fact

something wasn't in the record. He allowed the record to be reopened and put in the record.

Trial Examiner Royster: Do you have anything else you want to put in the record?

Mr. Harrington: Not at this time. I think there is enough in the record now to show one instance of promising of benefit if the employees would forsake the union. I think there is enough there to get a ruling on it. [113]

Trial Examiner Royster: I don't think there is anything to go to a jury on, on that question.

Mr. Harrington: These proceedings I don't think are comparable to jury proceedings. In that situation there is no requirement that a prima-facie case be made at any time before the entire record is in.

Trial Examiner Royster: There is so far as I am concerned.

Mr. Harrington: As an administrative matter, I would like to call the Trial Examiner's attention to the fact that I think this is poor administration. Suppose this case gets to the Board and the Board should reverse the Trial Examiner on that ruling, we would then have to have a new hearing and take evidence, so the respondent would be able to put in what evidence it has in rebuttal of the evidence I have put in. It would be needless time wasted and needless expense.

I think it would be better to handle it in one hearing.

I would ask the Trial Examiner to reserve ruling until all the evidence is in.

Trial Examiner Royster: Mr. Harrington, that is true of any ruling that the Trial Examiner may make. If he is wrong he will be set aside and it will require a rehearing.

I don't think that is any reason to permit or require anyone to put on evidence to negative a matter which I don't think even approaches a prima-facie case, so the ruling stands.

Mr. Simpson: May we have a few minutes' recess? [114]

Mr. Harrington: We have a ruling on the other parts of the respondent's motion?

Trial Examiner Royster: I denied them.

(Short recess.)

Trial Examiner Royster: On the record.

Mr. Simpson: Mr. Grimm.

LEE BLAIR GRIMM

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your full name and address, please. A. Lee Blair Grimm.

Q. Your address?

A. 11726 Lansdale, El Monte.

Q. Are you employed at the Nemec Combustion Engineers?

A. Yes, sir.

Q. How long have you been employed there?

A. Approximately 13 months, 14 months.

(Testimony of Lee Blair Grimm.)

Q. Were you employed there during the fall of 1950? A. Of 1950?

Q. This is 1952. We forget it sometimes.

A. During the part of the fall of 1950.

Q. What months were you there of 1950?

A. I believe I started in December. December 1st, I believe. [115]

Q. Do you know Mr. Leeper, who was employed at Nemec's during part of December 1950?

A. Yes, sir.

Q. Were you a welder, also?

A. Yes, sir.

Q. Were you present on the occasion that Mr. Snodgrass testified about, when Mr. Nemec came to Mr. Leeper's booth and there were a number of welders present? A. Yes.

Mr. Harrington: Just a moment. There isn't any testimony that Mr. Nemec came to Mr. Leeper's booth.

Mr. Simpson: I could be wrong, but I understand they sent for Mr. Nemec and he came out and this conversation occurred at Mr. Leeper's booth.

Q. (By Mr. Simpson): Am I mistaken about it? Where did it occur?

A. It occurred in Herb Snodgrass' booth.

Trial Examiner Royster: That is right.

Q. (By Mr. Simpson): You were present on that occasion? A. Yes, that is right.

Q. That was, I believe, according to the testimony, on December 27th?

(Testimony of Lee Blair Grimm.)

A. I couldn't be exact about the date, but I remember the night very well.

Q. Will you tell us just what was said on that occasion [116] when Mr. Nemec was present and you were present, and Mr. Leeper and Mr. Snodgrass and the others?

A. Well, I believe at that time we were working ten hours. Clarence had been arguing with the fellow that was on the burning machine there, due to the lunch hour.

Q. You mean by Clarence, Mr. Leeper?

A. Yes, sir. And he claimed that——

Mr. Harrington: Just a moment. This isn't part of the conversation is it?

Mr. Simpson: I am asking for the conversation when Mr. Nemec was present.

Q. (By Mr. Simpson): I am not asking for something that may have occurred before Mr. Nemec came there, Mr. Grimm.

A. Well, they wanted, Clarence wanted to get the half hour and the pay for the swing shift and the graveyard bonus.

Q. Is that what he said to Mr. Nemec?

A. Yes, sir.

Q. What did Mr. Nemec say?

A. Well, Mr. Nemec told him he would have to check in and find out, with different plants, what they were paying on the swing shift and graveyard bonuses.

Q. Go ahead and tell us what else was said.

(Testimony of Lee Blair Grimm.)

A. Well, they were talking about that, and then Clarence told me, he says,——

Trial Examiner Royster: Did others hear this?

The Witness: Yes, sir.

Trial Examiner Royster: I mean, did Mr. Nemec hear what Clarence said to you?

The Witness: No.

Trial Examiner Royster: Was this a private conversation?

The Witness: Well, Herb Snodgrass heard it, Bill Winn and Hitchcock.

Mr. Harrington: If it is not a conversation with Mr. Nemec, I am going to object.

Trial Examiner Royster: You intended to get the conversation with Mr. Nemec, what Mr. Leeper said to Mr. Nemec?

Mr. Simpson: Yes.

The Witness: He wanted to get paid for the lunch hour and he wanted the bonus on the swing shift, on the swing and graveyard, as Mr. Leeper put it; 10 per cent on swing shift and 20 per cent on graveyard.

Q. (By Mr. Simpson): Go ahead. What did Mr. Nemec say?

A. Mr. Nemec told him he would check into it.

Q. What did Mr. Leeper say?

A. Well, Leeper told him no, he would quit.

Q. Do you recall any conversation as to 24 hours for Mr. Nemec to check on the matter?

A. No. I heard that this morning, but I don't recollect anything like that, because Mr. Leeper

(Testimony of Lee Blair Grimm.)
came to me and Herb. He told me, he said, "When we check in——" [118]

Mr. Harrington: I object to this.

Q. (By Mr. Simpson): Have you told us as much of the conversation as you remember when Mr. Nemec was present? A. Yes.

Q. Did you later have a conversation with Mr. Leeper? A. Yes.

Q. Tell us what he said.

A. He said, "We will come in here." We started to work at 5:00. "We will come in at 4:30 and get our hoods and march out in front of the machine shop so they can see us."

Q. Did he say anything about quitting?

A. Yes.

Q. Did he say that in the conversation with Mr. Nemec? A. Yes.

Q. Did he say anything about whether he would or wouldn't finish out that shift?

A. I believe he worked ten hours.

Mr. Harrington: I am going to object as to what was said.

The Witness: I told you what was said.

Mr. Harrington: Counsel's question was, was anything said with respect to finishing out the shift. Is that correct, counsel?

Mr. Simpson: That is right.

The Witness: Was there anything said——

Q. (By Mr. Simpson): Was anything said about working out [119] that shift?

A. Yes; he finished the ten hours.

(Testimony of Lee Blair Grimm.)

Q. Did you see Mr. Leeper back at the plant after this, after he went off that shift?

Mr. Harrington: Just a moment. When——

Mr. Simpson: I will say it was the morning of the 28th of December.

The Witness: No, I never seen Mr. Leeper back there.

Q. (By Mr. Simpson): Mr. Grimm, I want to clarify one thing. Is it your testimony Mr. Leeper told Mr. Nemec if he didn't get the shift bonus and the lunch hour period pay, he was quitting?

A. That is absolutely right.

Q. Was anything said in that conversation at all about union activities? A. Not a word.

Mr. Simpson: No further questions.

Cross Examination

Q. (By Mr. Harrington): Now, Mr. Grimm, that conversation you have testified was in Mr. Snodgrass' welding booth?

A. Well, it was Mr. Snodgrass' on nights, but it really belonged to Herb Dyer.

Q. It was in the booth Mr. Snodgrass was working in? A. Yes.

Q. That conversation had started before Mr. Leeper came there, [120] hadn't it?

A. The conversation in that booth?

Q. Yes. A. No, sir.

Q. Weren't the welders talking among themselves before Mr. Leeper came?

A. Yes.

(Testimony of Lee Blair Grimm.)

Q. Was he there from the very beginning of the conversation?

A. Mr. Leeper was the one that brought it up.

Q. Did any of the other welders say anything?

A. Yes.

Q. What did they say?

A. Well, it was a part-time welder there that got a little hotheaded and said, "I will quit." He told Mr. Nemec to write his check out.

Q. What did Mr. Nemec say to that?

A. I don't recollect he said anything.

Q. Did he tell him to go to the office?

A. They both walked up the ramp; I imagine they went to the office.

Q. You don't know whether Mr. Nemec told him to go to the office or not?

A. I didn't hear him, if he did, no.

Q. Isn't it true that Mr. Leeper said he would give Nemec 24 hours to meet his demands? [121]

A. I don't remember that at all.

Q. Did you hear all the conversation?

A. I was right there from the beginning.

* * * * *

Q. (By Mr. Harrington): Did any of the other welders say anything in that conversation?

A. They were asking Mr. Nemec——

Q. They all took part in the conversation?

A. More or less.

Q. And asking about the bonus?

A. More or less.

Q. And asking about the half-hour pay?

(Testimony of Lee Blair Grimm.)

A. More or less.

Q. You testified you never saw Mr. Leeper back at the plant after that day.

A. I never saw him back in the plant after that.

Q. He finished out that shift, did he?

A. He finished out that shift.

* * * * * [122]

WALTER W. KOONTZ

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your full name, please. A. Walter W. Koontz.

Q. Are you employed at Nemec Combustion Engineers? A. Yes, sir.

Q. How long have you been employed?

A. A little over 15 years.

Q. What kind of work do you do?

A. I am hired as a machinist. I do assembly work on combustion equipment, also.

Q. Were you working at Nemec Combustion Engineers in the [123] fall of 1950?

A. I have been there 15 years.

Q. Continuously?

A. Yes, sir, with the exception of a little time out for Uncle Sam.

Q. Do you know Mr. Frederick, who testified?

A. Yes, sir.

Q. Was he working there in the shop with you for some time?

(Testimony of Walter W. Koontz.)

A. Frederick had worked with me for approximately four years, I believe.

Q. Will you state whether or not the company had any bulletins posted in the machine shop about cleaning the machinery?

A. Sir, I am not positive, but I can swear that there is at least 10 machines yet, to this day, with the signs on them yet, that says, "Keep this machine cleaned and oiled."

Q. Were such signs on those machines in December 1950? A. Yes, sir.

Q. And before that? A. Yes, sir.

Q. Is there any practice that is followed there about a bell ringing about five minutes before the end of a shift period, to allow time for that cleanup work? A. We have had that for years, sir.

Q. Did you have any occasion to observe the work done by Mr. Frederick? [124]

A. So far as observing the work done by Mr. Frederick, I would have; I get around the shop.

Q. Tell me this: Did you have a full set of tools for your work? A. Yes, I have.

Q. Did you observe Mr. Frederick having tools of his own?

A. At that time Mr. Frederick didn't have too awful many tools; I loaned Frederick tools.

Trial Examiner Royster: At what time?

The Witness: While Frederick was employed with Nemec Engineers.

Q. (By Mr. Simpson): Do you recall when Mr. Frederick began working part time for Nemec?

(Testimony of Walter W. Koontz.)

A. Yes, sir. When he started going to school, then he started working part time.

Q. Did you observe any difference in the type of work that he did after he started going to school from that that he had done before that?

A. Yes. I would definitely state there was a difference in his work, for the simple reason that I have tried to hold down two jobs and you can't do it. In other words, when Frederick went to school, that took a certain amount of his time, and trying to work part time at the shop, it is just too much on a man. Therefore, you have to slack down some place, to do it.

Q. What do you mean by that; Mr. Frederick's work slacked [125] down after he started going to school? A. I would say it did.

* * * * * [126]

FRED ALBERT NEMEC

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your full name, please. A. Fred Albert Nemec.

Q. Are you one of the partners of Nemec Combustion Engineers? A. I am.

Q. How long has that concern been in business?

A. About 22 years.

Q. What kind of work does it do? [133]

A. Manufacture gas and oil burners, and combustion equipment.

(Testimony of Fred Albert Nemec.)

Q. What kind of equipment?

A. Combustion. We do a general machine shop business, and especially we manufacture Jatos.

Q. What are Jatos?

A. Those are jet assist take-off rockets.

Q. When did you get the contract for the Jato equipment?

A. You will have to ask Mr. Martin to answer that.

Q. What year was it? A. 1950, I think.

Q. Did you know Mr. Clarence Leeper during his lifetime? A. Yes.

Q. He was employed at Nemec Engineers as a welder? A. He was.

Q. Do you recall seeing him and some other welders at one of the welding booths in the Nemec plant about the 27th of December, 1950?

A. Yes.

Q. How did you happen to go out to the booth on that occasion?

A. The night foreman, Mr. Milliron, said there was a work stoppage in the welding shop and Mr. Leeper had all the welders in an uproar, and wanted me to go down and see what I could do.

Q. Did you then go down to the welding department? [134] A. Yes.

Q. Who was there at the place where you went to?

A. Mr. Leeper and Mr. Grimm, Hartley, Snodgrass, and then one or two others. I can't remember their names. It seems as though about all the welders on that shift.

(Testimony of Fred Albert Nemec.)

Q. Did you have a conversation with somebody, or was there some discussion there that evening?

A. Yes. As I came up, Mr. Leeper said, "We want a showdown on this lunch hour pay." And he said, "If we don't get it, we are going to walk out."

One of the welders—I don't know which one—said, "You will have to speak for yourself, Clarence."

Q. Tell us what else was said and who said it.

A. Mr. Leeper said he had contacted Mr. Gilly, Mr. Martin, at various times regarding the lunch hour and the night bonus, retroactive to the time he came to work, and they hadn't given him any satisfaction.

I told him I couldn't make any exception to the ruling or couldn't overrule their decision, because that was not our department.

He says, "If I can't get the lunch hour pay retroactive to the time I went to work, and the other bonus, I am quitting."

A young fellow that was there said, "You can make mine out, too."

Q. Was anything else said? [135]

A. I think it was Hartley said to Mr. Leeper, he said, "I hope you don't mind if we don't strike along with you."

Q. He said that to Mr. Leeper? A. Yes.

Q. Was there anything else, that you recall?

A. Well, except Mr. Leeper said he had brought this matter up several times and he wanted a showdown, and I told him I would talk to Mr. Martin

(Testimony of Fred Albert Nemec.)

and Mr. Gilly and see what they had promised.

It is rather difficult to remember, but I think he said, "I will just give you 24 hours to make up your mind," or something to that effect.

Q. That is about the end of that conversation?

A. Yes.

Q. This other young man that said he was quitting and asked for his check, did he quit that night and get his check?

A. I think he did. I don't have anything to do with issuing the checks; I don't know whether he came up and got his check. It was after hours. I don't know whether the office was closed.

Q. Did you have occasion to take a check over to Mr. Leeper's home the following day?

A. Yes.

Q. Tell us about that, how you came about doing that.

A. He told me he would work the shift out as long as he was [136] there. I told him that would be perfectly all right.

And the next day my son and I, as we were going over to our yard, which was close to Mr. Leeper's home, I took Mr. Leeper's check to him.

Q. How far did he live from the plant?

A. It is about, say, four miles.

Q. You took his check along to drop it off for him at the house, to save him a trip back to the plant? A. That is right.

Mr. Harrington: I will object to this, Mr. Examiner.

(Testimony of Fred Albert Nemec.)

Trial Examiner Royster: I will sustain the objection to the leading character of the examination on that particular question.

Q. (By Mr. Simpson): Why did you take it to him, the check?

A. It was just about working time and he wasn't there. I supposed he would be at home. I just wanted to save him the trip in to get it.

Q. When you arrived at his home, did you see anyone?

A. Yes; Mrs. Leeper. I told her I had Mr. Leeper's check.

Q. What did she say?

A. She said, "What is the trouble?"

I said, "Well, Mr. Leeper has quit."

She seemed quite surprised to think he had quit. She wanted to know what the matter was, and I said, "Well, he has given us an ultimatum of several things he wants and we can't [137] meet his demands. Therefore, we are letting him quit."

Q. Was anything else said that you remember?

A. I can't recall the exact conversation, but I do remember saying that he had gotten the welding shop in an uproar.

Q. You said that? A. Yes.

Q. Anything else?

A. And that we couldn't be pushed around like that. I also told her he was one of the best welders we had ever had and I hated to see him go. But due to the trouble he had stirred up in the welding shop, we couldn't put him back.

(Testimony of Fred Albert Nemec.)

Q. Anything else that you recall?

A. That is about all.

Q. Do you recall saying anything to the effect he was an agitator?

A. No. I said he had stirred up a lot of trouble.

Q. At the time of this discussion out in the plant the night before, had there been anything whatsoever said about union demands or union activities?

A. No, not at all.

Q. Did you see Mr. Leeper again on the 28th, at the plant, that is, after you had been at his house and found he was not home? Did you see him after that date?

A. The next time I saw him he was out at the front door passing out—with the union representatives, anyway. [138]

Q. When was that?

A. I am not too sure. I think it was the next day or the day following the next day.

Q. Were you present when Mr. Leeper came back and got his tools?

A. No.

Q. You don't think you saw him? A. No.

Q. Do you know Mr. Thomas Frederick?

A. Yes.

Q. You knew him while he was working at the Nemec Combustion Engineers plant? A. Yes.

Q. You have had occasion to observe his work while he was there? A. Yes.

Q. Do you recall when Mr. Frederick began working part time, when he started going to school?

(Testimony of Fred Albert Nemec.)

A. Not specifically. I do know he was working part time.

Q. Tell us whether prior to the time Mr. Frederick was discharged in December 1950, you on any previous occasions had suggested or recommended that he be discharged.

A. Yes.

Q. When was it that that happened?

A. I would say a year or so before. [139]

Q. Whom did you talk with about it?

A. I talked to Fred Gilly.

Q. Mr. Gilly's job is what?

A. He is the foreman. I told him Frederick had no regard for the equipment, kept his machine very, very dirty. I told him I thought he ought to get rid of him. But Mr. Gilly said, "He is a good man on axles. We can use him on axles."

I said, "All right, have it your way."

On a couple of other occasions I had kicked on Mr. Frederick's care of machines. I don't remember which specific occasions I told Ed I thought we should get rid of him as quickly as possible, he was hard on equipment, had no regard for equipment, kept it dirty.

Q. Had you observed the equipment Mr. Frederick was working on? A. Yes, specifically.

Q. Tell the Examiner what it was you observed about the equipment, to cause you to make these complaints to Mr. Gilly.

A. He never cleaned his machine at all. I asked him on one or two occasions and he simply ignored

(Testimony of Fred Albert Nemec.)

me. I figured a man so indifferent to his work should be——

Mr. Harrington: I am going to object.

Trial Examiner Royster: Just tell us what you observed.

The Witness: I observed he was very negligent in the care of his machine, and moved very slowly.

Q. (By Mr. Simpson): What do you mean, moved slowly?

A. He didn't seem to care whether he worked or not.

Mr. Harrington: I object and move that be stricken.

The Witness: Put it this way: I didn't like the way he treated our equipment. He was just naturally a sloppy workman.

Q. (By Mr. Simpson): Did I understand you to say on one or more occasions you would ask him to clean the equipment? A. Yes.

Q. Did he clean it after that? A. No.

Q. Was there any other occasion where you had any conversation with Mr. Gilly or Mr. Martin relative to letting Mr. Frederick go?

A. Yes; just prior to the time he was let go I was still complaining. They said, well, they could use him on carbons. He said he would go in on carbons; but it was a dirty job anyway, and just suited him.

Q. Was he then shifted to carbons?

A. He was on carbons at that time. That is about all I had to say.

(Testimony of Fred Albert Nemec.)

Q. Were you consulted at the time Mr. Frederick was discharged? A. No.

Q. Did you know Mr. Frederick was handing out these cards somewhere, Respondent's Exhibit 1, to employees in the plant? [141] A. No.

Q. Or that he was handing out handbills, such as are in evidence as Exhibit 2? A. No.

Q. Did Frederick's discharge have anything to do whatsoever with union activities, so far as you are personally concerned?

Mr. Harrington: I object. The witness testified he wasn't consulted about his discharge.

Trial Examiner Royster: I will sustain the objection.

Q. (By Mr. Simpson): Mr. Nemec, do you know anything about this voucher for four hours' reporting pay that has been put in evidence as General Counsel's Exhibit 3? A. Yes.

Q. What do you know about that?

A. Well,——

Q. This is with respect to Mr. Leeper.

A. He said inasmuch as he had come back and reported in for work——

Mr. Harrington: Was the conversation with you?

The Witness: I am not too sure. I think it was. Some dates in there and periods when I was there and when I wasn't. I can't get one coordinated with the other. I talked to him on the phone. I rather think I saw him after he came back.

Q. (By Mr. Simpson): Your best recollection.

(Testimony of Fred Albert Nemec.)
Did you O.K. giving him four hours' call-in time because he said he had [142] taken his time to come in and he thought he was entitled to it?

A. He acted as though he thought it was an imposition on him, not getting the check to him in the morning. He worked until around 4:00 o'clock or so. So I said, "We will give it to him."

Q. Was he given the check you had taken to his house?

A. I didn't give him any check. I just O.K.'d it. I don't know anything about that.

Mr. Simpson: You may cross examine.

Cross Examination

Q. (By Mr. Harrington): How many employees are there in your plant, Mr. Nemec?

A. I don't know.

Q. What is your estimate?

A. Oh, I am sorry. I couldn't say. That is not in my department. I have a lot of other things to look after. I wouldn't know how many there were. I would say something over a hundred, maybe 120.

Q. You testified that your company was manufacturing Jatos, jet assisted——

A. Yes, that is our major operation.

Q. For whom are you manufacturing those?

A. The General Tire Company.

Q. Now, at this conversation of the welders on the night of [143] December 27th, in the booth, did any of the other welders take part in the conversation?

(Testimony of Fred Albert Nemec.)

A. Practically none. I mean to say, they didn't have much to say. Mr. Leeper was doing the talking. As I said before, one of the welders said, "You will have to speak for yourself." And after that Mr. Leeper said he was quitting.

Q. Now, when you went down to the welding shop, Leeper and the other welders were in a conversation among themselves?

A. That is right.

Q. Mr. Leeper said he would give you 24 hours to make up your mind?

A. Regarding what Mr. Martin and Mr. Gilly had talked to him about. He said if I wouldn't investigate it, to see if they had made any commitments. He said, "I will give you 24 hours to make up your mind."

Q. Now, you state the next day you were going to the company's yard when you took Leeper's check to him. A. That is right.

Q. Where is the company yard located?

A. Santa Fe Springs.

Q. About what time of day was that?

A. I think it was around 4:00 o'clock.

Q. When did you leave the plant?

A. Between 4:00 and 4:30.

Q. Then what time was it when you got to the house? [144] A. I am not sure.

Q. What time did the night shift start working?

A. I don't know that.

Q. I understood you to say Leeper was not at the plant when you left it.

(Testimony of Fred Albert Nemec.)

A. That is right. He hadn't picked up his check.

Q. Beg pardon? I didn't hear.

A. He hadn't picked up his check, so as we were going that way I took it out to him.

Q. Now, in that conversation with Mrs. Leeper, you told her that Mr. Leeper was not to be rehired, did you not?

A. Well, I don't know how to phrase it. It wasn't in that many words.

Q. What was said?

A. The gist of the conversation was that we were going to have to let him go, we couldn't meet the demands he had put on us.

Q. Did you tell Mrs. Leeper he was not to be called back or not to be rehired?

A. No, I wouldn't say it in that many words. I would say that rather I told her that we were letting him quit because he had several—we had to let him go; he had stirred up so much trouble we couldn't have stopped him from quitting. We couldn't have met all his demands, inasmuch as he had stirred up so much trouble; we couldn't do it.

Q. When Mr. Leeper came back he said he waived the demand for retroactive back pay if you would put him on, did he not? A. Yes.

Q. What did you say at that time?

A. I told him that we just couldn't put him back on.

Q. Did you tell him why?

A. No. I will qualify that a little. I think I did tell him that we couldn't put him back on because

(Testimony of Fred Albert Nemec.)

things had gone as far as they had. There was so much trouble stirred up it just wouldn't be right; something to that effect.

Q. Do you recall whether or not you also said that to Mrs. Leeper?

A. No, not specifically in those words. I told her we were letting him quit because he had stirred up so much trouble.

Q. Now, Mr. Nemec, I show you a two-page document marked General Counsel's Exhibit 4. It is on the letter-head of Nemec Engineers. Is that your signature (indicating)? A. Yes.

Q. On the bottom of the letter? A. Yes.

Q. You did mail that letter to the National Labor Relations Board? A. Yes, I think so.

Mr. Harrington: I offer General Counsel's Exhibit 4 in evidence. [146]

Mr. Simpson: What is the purpose of it?

Mr. Harrington: An admission against interest, a letter written by the witness.

Mr. Simpson: You have some part of it you say constitutes an admission. Are you using it for impeachment or what?

Mr. Harrington: I am using it as an admission against interest on the part of this witness. It gives a statement which is inconsistent with his testimony given at the present time, as to his conversation with Mrs. Leeper.

Trial Examiner Royster: You offer it as independent evidence, an evidence as affecting his testimony on the stand, also?

(Testimony of Fred Albert Nemec.)

Mr. Harrington: Yes.

Trial Examiner Royster: Is there any objection?

Mr. Simpson: Which portion of it is it that you are talking about that is inconsistent with what he says?

Mr. Harrington: The first paragraph on page 2 in the letter, the witness said, "I told her Mr. Leeper had quit and was not to be rehired."

Mr. Simpson: I don't see anything in the letter, as far as I have read, that is inconsistent with what the witness has testified, Mr. Examiner.

Trial Examiner Royster: I think I will agree on that, Mr. Simpson.

The Witness: That is hard for me to remember, what I [147] put in that letter a year ago. I am just recalling to the best of my recollection.

Mr. Harrington: Don't worry about it.

Trial Examiner Royster: Do you object to the receipt of the letter as admissions?

Mr. Simpson: Yes, I do. I don't see anything in here which is an admission against interest.

Trial Examiner Royster: I will overrule the objection and receive General Counsel's Exhibit 4.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 and was received in evidence.)

Q. (By Mr. Harrington): Do you recall when Mr. Frederick started working part time?

A. No.

Q. Was it in 1949 or 1950?

A. I haven't the slightest idea.

(Testimony of Fred Albert Nemec.)

Q. What are your duties in the plant, Mr. Nemec? A. I am one of the owners.

Q. What do you do?

A. Oh, I do the engineering on tooling, production; assist in the general conduct of the business.

Q. Who handles production, do you or does Mr. Martin?

A. Both of us.

Q. Do either one of you spend more time than the other on production work? [148]

A. Yes, I would say Mr. Martin spends more time.

Q. He is the production man in the plant, isn't he?

A. By "production" do you mean the man that has the actual execution of the jobs or assigns the jobs?

Q. Yes.

A. No. Mr. Gilly, we assign the jobs to Mr. Gilly. We usually draw up the tooling to be made and turn it over to him, and he looks after the execution of the orders.

Q. And Mr. Martin sees that the work is done out in the shop?

A. Mr. Gilly reports to him the progress.

Q. He reports to Mr. Martin?

A. Yes, that is right.

Q. Now, you stated on one occasion you asked Mr. Frederick to clean up equipment and he didn't. When was that?

A. That was, I would estimate, about two years

(Testimony of Fred Albert Nemec.)

ago. I haven't spent much time in the shop since then.

Q. About two years ago would be about January of 1950, is that right?

A. I think it must have been longer ago than that. It was while we were running axles, anyhow.

Q. It was more than two years ago?

A. I think so.

Q. You haven't spent much time in the shop since then?

A. Not a great deal. I pass through constantly. I don't look after specific jobs, as a rule. [149]

Q. Now, at this conversation you testified where Mr. Gilly said he could use Frederick on carbons, do you recall you testified on direct examination to such a conversation? A. Yes.

Q. At that time was there anybody putting in full-time work on carbons? A. No.

Q. The work that Frederick did on carbons was just part time? A. That is right.

Q. Later on you did get a man full time on carbons? A. I don't think so. I don't know.

Mr. Harrington: No further questions from this witness.

Redirect Examination

Q. (By Mr. Simpson): Mr. Nemec, to your knowledge, before Mr. Leeper quit his job had he been engaged in union activities at the plant?

A. Not at all.

Q. Had you had any conversations with him about unions? A. Yes.

(Testimony of Fred Albert Nemec.)

Q. What had he said to you about unions?

A. He said that the union came in, if it did, he would quit.

Q. Did you know whether other employees in the plant than Mr. Frederick had been expressing themselves as in favor of unions?

A. Oh, yes, I talked to several. [150]

Q. Do you recall the names of any of those men?

A. Yes. Mr. Matlock, Mr. Bagley, Mr. Russ—it was not Bagley. Mr. Russ, Mr. Bellheimer and several others; I can't recall their names, specific ones, now.

Q. They continued to work for Nemec Engineering after the election? A. Yes.

Mr. Simpson: That is all.

Recross Examination

Q. (By Mr. Harrington): How long did Mr. Bellheimer continue to work?

A. I don't know.

Q. Isn't it true he quit working there immediately after the election? A. No.

Q. Do you know about Mr. Russ, how long he continued to work there? A. No, I am sorry.

Q. Do you know how long Mr. Bagley continued to work there?

A. I don't have any records of the time they worked.

Q. Who was the other man you testified to, or was that all? It was Russ, Bagley, Bellheimer?

A. There were others——

(Testimony of Fred Albert Nemec.)

Mr. Simpson: Matlock.

The Witness: ——two or three welders. I can't recall [151] their names.

Q. (By Mr. Harrington): Did you have any discussion with Mr. Matlock about the union?

A. Yes.

Q. Where were those discussions?

A. At his machine.

Q. What was said?

A. I don't know specifically.

Q. You don't know what was said?

A. Not specifically; just a general discussion. I know what he said regarding the unions.

Q. What did he say?

A. I told him I couldn't see where the unions were going to do anybody any good in our shop; if the men felt like they wanted a union they could have it.

He said, "Well, as far as I am concerned, the unions have never done anything for me." At the same time, he said he still thought unions were a good thing.

Q. After going to Mrs. Leeper's home, you didn't give her the check, did you?

A. She testified that I took it back. I can't remember. I suppose I did.

Q. But you don't remember what you did with it, is that your testimony? A. No. [152]

Mr. Harrington: I have no further questions.

Mr. Simpson: That is all.

Trial Examiner Royster: You are excused.

(Witness excused.)

Trial Examiner Royster: We will take a five-minute recess.

(Short recess.)

Trial Examiner Royster: On the record.

Mr. Simpson: Mr. Gilly.

EDWARD C. GILLY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your name and address, please.

A. Edward C. Gilly. 13951 East Lomitas.

Q. What is your occupation?

A. I am shop foreman at the plant.

Q. Nemec?

A. Nemec Combustion Engineers.

Q. How long have you been employed by Nemec Combustion Engineers?

A. Ten years.

Q. What experience have you had in the type of work you have done at Nemec Combustion Engineers?

A. I have worked in oil tool shops before I came there, and [153] the past ten years at Nemec's.

Q. How long have you been the foreman?

A. Approximately five years.

Q. Do you know Mr. Thomas Frederick?

A. Yes, sir.

(Testimony of Edward C. Gilly.)

Q. How long have you known him?

A. Ever since he came to work at the plant.

Q. Did he work under your supervision?

A. Yes, sir.

Q. The same shift over which you were foreman?

A. Yes.

Q. What type of work did Mr. Frederick do when he first went to work at Nemec?

A. I believe he started working on axles, if I remember.

Q. What kind of work did he do on axles?

A. Rough machined axles, drop axles for trailers.

Q. About how long did he work on axles, according to your recollection?

A. Approximately a year.

Q. Did you have occasion to observe his work while he was working on axles? A. Yes, sir.

Q. What kind of work did he turn out?

A. He was work was fair.

Q. He was switched from axles to some other kind of work? [154] A. Yes.

Q. About when was that?

A. I don't recall the actual date. It was at the time that we slowed down on making axles.

Q. What kind of work was he switched to?

A. Well, he was broken in on running carbon inserts.

Q. Tell us what that consists of.

A. It consists of machining an insert out of a solid carbon bar, for a nozzle.

(Testimony of Edward C. Gilly.)

Q. About how long did Mr. Frederick work on the carbon inserts?

A. Off and on for, I would say, approximately two years or a little longer.

Q. Do you recall when Mr. Frederick began working part time?

A. Only that it was when he started going to school under the G.I. Bill of Rights.

Q. Were you the one that he talked to about making arrangements to work part time while he was attending school?

A. Yes, he talked to me, but I believe he also talked to Mr. Martin.

Q. When he was put on part time, was he working on carbons?

A. The greater part of the time. There were some jobs we did use him on otherwise.

Q. Did you have any conversation with Mr. Frederick about his dislike of working on carbons?

A. Yes.

Q. Do you recall about when that was with respect to the time he was discharged?

A. That was approximately three weeks before he was discharged.

Q. What did he say to you about working on carbons?

A. He told me that if he had to run carbons he was going to quit.

Q. What did you say to him?

A. I tried to explain to him that due to the fact

(Testimony of Edward C. Gilly.)
he was only working a few hours a day it was the only job I could conveniently use him on.

Q. What did he say to that?

A. Well, he still wanted off of the carbon job.

Q. Was he kept on the carbon job?

A. Yes, but not because I wanted him—no, he was not kept on the carbon job. He was kept on, though, because Mr. Martin asked me to keep him.

Mr. Harrington: I am going to object to that. It is going beyond the question.

Trial Examiner Royster: The answer is he was not kept on the carbon job?

Mr. Harrington: Yes.

Q. (By Mr. Simpson): Did you report to Mr. Martin about Mr. Frederick stating if he had to work on carbons he was going to quit? [156]

A. Yes, sir.

Q. What did Mr. Martin tell you about Mr. Frederick?

A. Well, Mr. Martin said to keep him on for a while yet, until after the holidays, anyway.

Q. Did you have any conversations, or, rather, did you have occasion to observe whether Mr. Frederick kept his machines clean or not?

A. Yes, I did.

Q. Did he?

A. No, he did not.

Q. Did you talk to him, speak to him about that?

A. I spoke to him several times, without any results.

Q. Without any results, you mean that he didn't

(Testimony of Edward C. Gilly.)

clean them any better afterwards than he had before?

A. He would clean them once and then fall back into his old habits again.

Q. Was it a policy of the company that the machines should all be kept cleaned and oiled?

A. It is a policy of the company, yes.

Q. Was it while Mr. Frederick was there?

A. Yes.

Q. They have bulletins posted in the shop about cleaning machines, keeping machines clean?

A. Yes.

Q. Were there also notices on the machines themselves? [157]

A. On some of the equipment, yes.

Q. Did they have a bell they rang about five minutes before quitting time on each shift, to afford the workmen the opportunity of cleaning up their machines before they went off the shift? A. Yes.

Q. Was that carried out right along, that policy?

A. Yes, that has been in effect quite some time.

Q. Did you report to Mr. Martin or to Mr. Nemec anything that you had observed concerning Mr. Frederick's work or his attitude?

A. Well, at the time that I reported to him that Mr. Frederick no longer wished to run carbons and wanted to quit, I told Mr. Martin that I was not satisfied at all with his conduct in the past few months.

Q. All right. What conduct of Mr. Frederick's were you not satisfied with in the past few months?

(Testimony of Edward C. Gilly.)

A. Well, he for some reason——

Mr. Harrington: I object to this conversation of what he told Mr. Martin.

Mr. Simpson: No. This is telling the witness; his own observation.

Trial Examiner Royster: I will overrule the objection.

The Witness: What was that question?

(Question read.) [158]

The Witness: He seemed to have lost all interest in his work, his job.

Q. (By Mr. Simpson): Did you report that to Mr. Martin or to Mr. Nemec?

A. To Mr. Martin.

Q. Were there any other occasions that you made any reports to Mr. Martin or Mr. Nemec concerning Mr. Frederick's work, than those you have mentioned already?

A. Only those that led to his dismissal.

Q. What happened just prior to the time he was dismissed?

A. I believe on the day before he was dismissed I had him helping a Mr. Betker reassemble a Potter & Johnston automatic, and, as I came by, Mr. Frederick was using the sledge hammer on the machine.

Q. What was he doing with the sledge hammer on this Potter & Johnston?

A. He was trying to force the cam drum into the machine.

(Testimony of Edward C. Gilly.)

Q. Is that the proper thing to do, use a sledge hammer and force the cam into the machine?

A. No, sir.

Q. How should it be done?

A. Well, if it won't go on freely, there is some reason for it not doing so.

Q. Did you at that time speak to Mr. Frederick about his using the sledge hammer on the Potter & Johnston machine? [159]

A. Yes, I did. I spoke to both he and Mr. Betker.

Q. What did you tell him?

A. I told him not to use the sledge hammer and pull the drum back out and see why it would not go on.

Q. What was then done?

A. Then I left, and a few minutes later I walked back by and they were using the sledge hammer again.

Q. What happened then?

A. I told them to at least use a block if they wanted to hammer on it.

Q. Use what?

A. A block of wood, if they wanted to hammer on it.

Q. Did anything else occur on that occasion?

A. No, except both of us were probably a little peeved.

Q. What is this Potter & Johnston machine?

A. It was a machine being set up to bore holes in these Jato units we are making.

Q. What is its value?

(Testimony of Edward C. Gilly.)

A. I would not know.

Q. Would the using of a sledge hammer in the manner you have testified to be likely to cause damage to a machine of that kind?

A. They were hammering on a cast-iron drum, and it could have broken the drum, which is hardly replaceable.

Q. Do you recall any incident in connection with a tool [160] holder that Mr. Frederick was working on?

A. Yes, the following morning—we have a big Acme four-spindle, which the tools were sliding back in. I gave Mr. Frederick orders to drill holes in the tool holder on the top, and insert a screw to keep it from pushing back.

Q. All right. What did he do?

A. Well, he tightened the screws that hold the bar, that clamp the bar so tight that he broke the casting instead of drilling a hole, as he was told.

Q. Was that what you had told him to do?

A. No.

Q. Was that the proper way to do that work?

A. Not after he had been told how to do it.

Q. Did you speak to him about that?

A. While I gave him a slight bawling out, I was so mad I thought I better go up and see Mr. Martin.

Q. But you did call it to Mr. Frederick's attention? A. Yes.

Q. He had not followed your instructions, is that correct? A. That is correct.

(Testimony of Edward C. Gilly.)

Q. Did you then speak to Mr. Martin about Mr. Frederick having broken the tool holder?

A. Immediately I spoke to Mr. Martin.

Q. Did you have any discussion with Mr. Martin at that time about letting Mr. Frederick go?

A. I asked Mr. Martin to give me the O.K. to release him that day.

Q. Had you reported to Mr. Martin the incidents of Mr. Frederick using the sledge hammer on the Potter & Johnston machine?

A. I believe I mentioned it at that time to him.

Q. Did these events occur right around Christmas of 1950? A. Yes.

Q. Before or after Christmas?

A. After Christmas.

Q. Right after Christmas? A. Yes.

Q. This conversation you had previously had with Mr. Martin was before Christmas, when he said to keep him on until after the holidays?

A. Yes.

Q. Now, at the time you talked to Mr. Martin about Mr. Frederick's breaking the tool holder and asked him for permission to let Mr. Frederick go, did he give you that permission?

A. He told me to suit myself.

Q. Suit yourself? A. Yes.

Q. What did you then do?

A. I went down to the office and had his time prepared as of [162] quitting time.

Q. Did you get his check? A. Yes.

Q. What did you do with it?

(Testimony of Edward C. Gilly.)

A. I gave it to him at quitting time.

Q. Did you have a conversation with him at the time you gave it to him? A. Yes.

Q. All right. Tell us what was said and who said it.

A. Well, I told him due to the fact that he didn't clean up his machines and so on, that I would have to let him go.

Q. What did he say?

A. Well, he didn't have much to say. He started gathering his tools.

Q. Was anything else said that you remember?

A. Not that I recall.

Q. Do you recall saying to Mr. Frederick on that occasion that you were just doing what Mr. Nemec, the old man, had told you to do?

A. Yes, sir.

Q. Did you tell him that—I believe you said that he had not kept his machine clean? A. Yes.

Q. Did you tell him that that was what Mr. Nemec had complained about? [163] A. Yes.

Q. Did you mention any of these other incidents, such as using the sledge hammer or the breaking of a tool holder? A. Yes.

Q. Now, at the time that Mr. Frederick was dismissed, at your request, did the fact that he was or was not engaged in union activities have anything whatsoever to do with his dismissal?

A. No, sir.

Q. Did you know anything about Mr. Frederick's union activities? A. No, sir.

(Testimony of Edward C. Gilly.)

Q. Had he handed you a card and asked you to sign it?

A. Possibly, yes. That was being done quite often at that time.

Q. Were different men in the plant signing other employees' names to the cards and passing them around?

A. Yes.

Q. Did you work on the shift where Mr. Leeper worked?

A. Only when he first came to work there.

Q. Were you present on the occasion when this discussion occurred out in the shop, that Mr. Nemec and Mr. Snodgrass testified to? A. No.

Q. Did you see Mr. Leeper at the plant the day after that event occurred? [164] A. Yes, sir.

Q. Did he come in and get his tools?

A. Yes, he came in and asked me to go to the welding shop to pick up his helmet.

Q. Did you? A. Yes.

Q. You went with him?

A. No, he did not want to go down.

Q. I see. You went down and got them?

A. Yes.

Q. Did he say anything to you about whether he had quit his job or not?

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: I think that would come in as an admission, if there was such an admission. I will overrule it.

(Testimony of Edward C. Gilly.)

The Witness: Yes, he said he was sorry he quit. He wanted me to talk to Mr. Nemec.

Q. (By Mr. Simpson): But you were not foreman of his shift. A. No, sir.

Mr. Simpson: You may cross examine.

Cross Examination

Q. (By Mr. Harrington): How long did you say you were shop foreman?

A. Approximately five years.

Q. Five years; you mean from 1952? [165]

A. Yes, from now.

Q. Then it was 1947, is that right?

A. Possibly longer; I don't recall just when, what year it was.

Q. Did Mr. Frederick work under you all the time he worked for the company?

A. Yes.

Q. Now, when Mr. Frederick worked on this carbon insert work that you have described, that work wasn't steady work, was it?

A. Not at all times, no.

Q. Around October of 1950 it became steady work and a man was put on it full time, is that right?

A. I think he was still running carbon in on it.

Mr. Simpson: You will have to speak up, Mr. Gilly. I can't hear you.

The Witness: I believe he was still running carbon in October.

Trial Examiner Royster: Keep the question in

(Testimony of Edward C. Gilly.)

mind, Mr. Gilly. In October was there a man put on that job full time?

The Witness: Not that I can recall.

Q. (By Mr. Harrington): Was there a man put on that job full time at any time?

A. Yes.

Q. When?

A. I couldn't recall the exact date. I could look it up. [166]

Q. Can you recall it by month?

A. No, I couldn't.

Q. So then you don't know when the man was put working on there steady?

A. I know it was some time after Mr. Frederick was taken off the job.

Q. When was Mr. Frederick taken off the job?

A. When he made up his mind he was not going to run carbons any more.

Q. When was that?

A. That, I believe, was in the last part of November or the first part of December.

Q. Didn't the company in October, November, get a big order, big contract from another company?

A. That was in June.

Q. Did that necessitate more carbon work?

A. Eventually, yes. But it had not come into full production as yet.

Q. When did it come into full production?

A. Well, it works hand in hand with our Jato units, and I don't believe we got into full production until late December.

(Testimony of Edward C. Gilly.)

Q. Now, Frederick was not working on carbons in December, was he? A. No.

Q. Was he working on carbons in November?

A. As I recall, yes.

Q. You had a conversation with him about the fact that he didn't like to work on carbons, isn't that right? A. Yes.

Q. Other employees didn't like to work on carbons, either, did they?

A. Well, some of them don't seem to mind it.

Q. Did other employees tell you they didn't want to work on carbons? A. Yes.

Q. So it wasn't anything unusual to be told an employee didn't like to work on carbons, isn't that right? A. Yes.

Q. After you took Frederick off working on carbons, what did he do then?

A. Oh, he helped on various setups and breakdowns.

Q. Now, when did you speak to Frederick about —you testified you spoke to him one time about not keeping his machine clean and there wasn't any result. What was that?

A. Oh, that was when he was running axles at one time.

Q. When?

A. The exact date I don't recall. I had spoken to him more than once, of course.

Q. Well, according to your testimony, Frederick worked on running axles for about two years after he went to work for the [168] company.

(Testimony of Edward C. Gilly.)

A. Yes, approximately.

Q. That would bring it, would it not, to about 1948, when he quit working on axles?

A. Yes, I imagine it would.

Q. Then it was either in 1948 or before 1948 when you spoke to him about cleaning his machine, keeping his machine clean? A. Yes.

Q. You have testified that when the bell rang the men cleaned the machines. What men cleaned the machines, the operators of the machines?

A. Yes.

Q. Isn't it the duty of the operator to keep the machine clean that he works on, that he operates?

A. Yes.

Q. Now, you testified that you have reported to Martin that Mr. Frederick had lost his interest in his job. When did you report that to Martin?

A. At the time I reported he no longer wanted to run carbons.

Q. When was that?

A. As I recall it, it was either the last of November or the first part of December.

Q. Where did you report that to Martin?

A. In his office.

Q. Was anybody else present? [169]

A. I do not recall.

Q. What did Mr. Martin say?

A. Mr. Martin said to keep him on until after the first of the year and we would see how things would work out.

Q. What did you say to Mr. Martin?

(Testimony of Edward C. Gilly.)

A. When he said that?

Q. No. What did you say when you opened the conversation?

A. I told him Mr. Frederick wanted to quit if he had to stay on carbons. I thought we would be just as well off letting him go now as later.

Q. What did Mr. Martin say?

A. Mr. Martin said, "Well, I would like to keep him until after the holidays, at least."

Q. Now, you stated the day before his discharge Frederick was helping another employee. What was his name? A. Betker.

Q. On a Potter & Johnston machine. Are you sure that was the day before his discharge? Might it not have been two or three weeks before his discharge?

A. I am sure that was the day before. That was one of the main incidents for his being laid off.

Q. You say that was the day before his discharge? A. Yes.

Q. Are you positive now it was not a week before his discharge? A. Yes. [170]

Q. You are positive about that? A. Yes.

Q. Now, you stated that they were using a hammer on it, did you not? A. A sledge hammer.

Q. Sledge hammer. A. Yes.

Q. What did you say to them when they were using the hammer?

A. I told them it was no way to treat a piece of equipment, to pull the drum out and see why it would not go it.

(Testimony of Edward C. Gilly.)

Q. Did you stay there then to see if they did that?

A. They pulled the drum out, yes, and I left.

Q. Then you came back a few minutes later, is that correct? A. Yes.

Q. At that time you say they were using a hammer again? A. Yes.

Q. You told them then, at least, to use a block on it? A. Yes.

Q. What did you mean by a block? Is it a wooden piece that goes between the hammer and the machine? A. A piece of 4 x 4.

Q. They put it against the drum and hammer the block?

A. Yes. And I told them not to hit it so heavy, either.

Q. Isn't it true that the day before his discharge Mr. Frederick was working on a four-spindle automatic machine? [171]

A. That was the day he was discharged.

Q. Isn't it true it takes more than one day to set up one of those machines?

A. He was not setting up a four-spindle machine.

Q. What was he doing?

A. He was doing a repair job.

Q. Is it your testimony he wasn't working on that machine the day before he was discharged?

A. So far as I can remember, yes.

Q. Now, did you say that Mr. Frederick was making a setup on a four-spindle machine?

(Testimony of Edward C. Gilly.)

A. No.

Q. What did you say about that?

A. I said he was doing some repair work to it.

Q. Who operated that machine?

A. At that time it was probably a Mr. Elmer Ur.

Q. Was Mr. Elmer Ur and Mr. Frederick working on the machine together, to repair it?

A. I don't believe so.

Q. Who was working on it with Mr. Frederick?

A. Mr. Frederick was by himself.

Q. He didn't have anybody help him repair the machine? A. Not that I recall.

Q. Now, were you the one who gave Mr. Frederick orders to repair the machine? [172]

A. Yes.

Q. What did you tell him when you told him to repair it?

A. I told him due to the fact the drills were shoving back, to put them in their right position and drill in to them a hole, which is already in the holder for that purpose, and put a screw down into the hole so they could not push back and ruin the setup again.

Q. Did you change the gears in the machine?

A. There is a possibility I did, yes.

Q. Were any parts run through the machine?

A. No; he broke the holder.

Q. What is the holder?

A. The holder is the part that you slip a bar into. It has a drill or boring bar, whatever the case may be, for a certain operation.

(Testimony of Edward C. Gilly.)

Q. It has a slot cut in it, does it, that you slip the bar in? A. Yes.

Q. Wasn't that holder welded in the back?

A. Yes.

Q. It had previously been broken, had it not?

A. Yes.

Q. Didn't it crack opposite, right next to the weld, on this occasion? A. Yes.

Q. Now, didn't you discuss that with Mr. Frederick? [173]

A. The only thing I told Mr. Frederick is that he should have done what he was told.

Q. Was it decided to weld the crack in the drill holder? A. Yes.

Q. Who made that decision? A. I did.

Q. Did you discuss it with Mr. Frederick?

A. Yes. I told him how to grind it.

Q. I am talking about welding it. My question is, was it decided to weld the holder? A. Yes.

Q. And you discussed it with Mr. Frederick?

A. Yes.

Q. Was it also decided to drill and tap a hole in the top of it so a set screw could be put in to hold it more firmly?

A. That was not decided at that time. I did mention, I had told him to do that, to start with, and that is the way it would have to be done.

Q. What did he do, to start with?

A. He tightened down on the holder where it slid to such a point it pulls loose from the original weld.

(Testimony of Edward C. Gilly.)

Q. Now, what time of day did that happen?

A. At approximately 10:00 in the morning, I believe.

Q. After the part was welded, was it put back on the machine? A. Not that day, no. [174]

Q. When was it put back on the machine?

A. I don't recall. I know it was after Mr. Frederick left.

Q. Who put it back on the machine?

A. I don't recall the exact individual. It could have been any number of fellows.

Q. Isn't it true that it was remounted on the machine? Mr. Frederick remounted it on the machine and the machine worked all right then?

A. He remounted what?

Q. After it was welded did not Mr. Frederick remount it on the machine?

A. No. I don't believe that piece was ever put back on the machine, due to a bad weld.

Q. Then you testified you spoke to Mr. Martin.

A. Yes.

Q. And asked him to fire Mr. Frederick. Where did you speak to Mr. Martin?

A. In his office.

Q. Was anybody else present?

A. I don't believe so.

Q. What did Mr. Martin tell you?

A. To suit myself.

Q. Was it at that conversation he told you to keep Frederick on until after the holidays?

A. No. [175]

(Testimony of Edward C. Gilly.)

Q. When did he tell you that?

A. At the time Mr. Frederick more or less refused to run any more carbon.

Q. Then you had two conversations with Mr. Martin, is that right? A. Yes.

Q. Now, when you fired Mr. Frederick, you told him it was due to not cleaning his machine, isn't that correct? A. Yes.

Q. Isn't it true that that holder on the machine was old and was a very old part?

A. Well, it was part of the original machine, yes.

Q. Now, when you told Mr. Frederick he was being discharged, did Mr. Frederick say anything to you?

A. Not at the time I handed him his check.

Q. Didn't he tell you that he hadn't worked as an operator for several months on a machine?

A. No, sir.

Q. Wasn't that the machine that was about 30 years old?

A. That is a possibility. I don't know. It is quite an old machine, yes.

Q. Now, you testified you saw Mr. Leeper in the plant on a certain day? A. Yes.

Q. How was he dressed when you saw him? [176]

A. I believe he had khakis on; I wouldn't swear to that.

Q. Now, you stated he wanted you to talk to Mr. Nemec? A. Yes.

Q. Did he say about what?

A. Well, no, he did not.

(Testimony of Edward C. Gilly.)

Q. Beg pardon?

A. He did not come right out and say what.

Q. What did he say?

A. He said that he was sorry he quit, and he wanted to know if I would talk to Mr. Nemec about it.

Q. About what?

A. Presumably about coming back to work. I know he was asking me if it was at all possible.

Q. Mr. Leeper asked you if it was at all possible to come back to work? A. Yes.

Q. What did you tell him?

A. I told him he would have to see Mr. Nemec, because I had nothing to do with what happened the previous night.

Q. Do you know whether or not he saw Mr. Nemec? A. No.

Q. Did you get his hat?

A. His helmet, yes.

Q. Or his helmet, rather. Now, when was that conversation with Mr. Leeper? [177]

A. It was the day following the time that he quit, or whatever happened on that——

Q. Are you sure it was not on January 2nd?

A. Yes, I am sure. It was before that.

Q. Now, I believe you stated that Mr. Frederick was working on that Potter & Johnston machine the day before his discharge?

A. Yes, as I recall.

Q. Now, did you see Mr. Martin with respect to that?

(Testimony of Edward C. Gilly.)

A. No, not until I went up to Mr. Martin—Mr. Martin did not know about that instance until I went up the following day and told him about this tool holder business.

Q. Isn't it true that it was a week before his dismissal that Frederick was working on the Potter & Johnston, and you went to Mr. Martin and Mr. Martin told you you would have to wait until after the Christmas holidays?

A. Not as I recall it.

Q. Then if you ever said at any time previous it was a week before, is that statement correct?

A. Yes, as I remember now.

Mr. Harrington: I have no further questions.

Mr. Simpson: That is all.

Trial Examiner Royster: You are excused.

(Witness excused.)

Mr. Simpson: Mr. Martin. [178]

ELWOOD C. MARTIN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your full name, please. A. Elwood C. Martin.

Q. What is your position, Mr. Martin?

A. Partner.

Q. What is it? A. Partner.

Q. Of what?

A. Of Nemec Combustion Engineers.

(Testimony of Elwood C. Martin.)

Q. How long have you been a partner of Nemec Combustion Engineers? A. 1941.

Q. What kind of work do you do at Nemec's?

A. General management.

Q. What had been your experience before you became a partner?

A. I had worked with the company for, well, since 1939 on a full-time basis, and been associated off and on with it since 1937, to '39. I worked in the shop, I worked in the office, and general management.

Q. Do you know Mr. Thomas Frederick?

A. Yes, I do.

Q. Did you first become acquainted with him when he went to [179] work for Nemec?

A. Yes.

Q. What kind of work was he doing?

A. When he first started in with us I believe he was on the axle program, and we were also making hubs, a job for Emco Engineering. He was largely on that, I believe, when he started.

Q. Is that machine in operation? A. Yes.

Q. Did you have any occasion to observe his work? A. Yes, sir.

Q. Will you state what you observed concerning Mr. Frederick's work while he was at Nemec?

A. When he first started with us he was out of the Navy and he had a small degree of training there, I believe. We trained him and broke him on this machine; those hubs were done on some machines we made up ourselves.

(Testimony of Elwood C. Martin.)

The Potter & Johnston were on the same job, on the hub end. We had one or two other axle jobs. Mr. Frederick was fairly satisfactory the first year or so he worked for us.

Then we ran low on material on some contracts, and, if I remember correctly, why, he was laid off. Then he came back and we still were doing some axle work and we also had some contracts then; that was in 1948, I think, around that period, with the Jumbo Steel Company in Azusa, making some jack parts [180] for the Army.

Mr. Frederick also worked on that work. At that time, from the start on the axle program he was always sloppy about keeping his machines clean. We have signs up on the bulletin boards, stating they should be cleaned, and I can definitely remember a number of times when there is a sign put on his machine, stating, "Please keep this machine clean," by Mr. Nemec and by Ed Gilly; as has been stated before, some of the machines have signs on them still.

There are signs on the bulletin board and we have a five-minute warning bell for the boys to clean up their machines. Every man that runs a machine is supposed to clean it up, or the space he works in. The welder cleans his own machine. They hang their helmets up, and the excess material on the floor is cleaned up. That is their job.

In most cases, in setting up a machine or repairing it, you have to clean the machine and you have to oil it or you can't make a decent setup. You can't

(Testimony of Elwood C. Martin.)

set a tool post on a lathe bed or a ways that is all dirty and have it hold tolerances; it just isn't done.

Q. Mr. Frederick worked on setup and maintenance for a while?

A. Off and on, yes. In other words, if we were short of axle stock or even at times on carbons, why, he would help out a little on the setup. But he got crude on it.

Q. Did you observe whether or not, while he worked on setup [181] and maintenance, he did or didn't keep his machine clean?

A. I observed he didn't. In fact, I told Ed several times, "You better get after Frederick, because Mr. Nemec is going to blow his top. That is no way to keep his equipment."

Q. By Ed, you mean Mr. Gilly? A. Yes.

Q. Did you have any conversation with Mr. Gilly about Mr. Frederick stating that he had to work on carbons, if he had to work on carbons he would quit?

A. Yes.

Q. Do you recall about when that conversation was?

A. That was, if I remember correctly, I think around three weeks before his discharge.

Q. What did Mr. Gilly tell you about that?

A. Well, he said that he hadn't worked out satisfactory in helping on the tooling, he had a complete lack of cooperation. That he wasn't interested in his job. He was spending an awful lot of time walking around the shop, and that he wasn't well enough

(Testimony of Elwood C. Martin.)
qualified to go on other work; that he should be kept on the carbon.

Now, on that carbon deal, when a man is broken in on it, it takes a certain touch. In other words, the man is trained and he has to bore a certain orifice. It is done with a finger or stick or wad of cotton, or something like that. A man with a big finger can't get them in. Frederick's hand went in good. [182] The work isn't the cleanest work in the world.

When you hire a man to do a specific job and he is qualified to do it, you have to keep him on it or hire somebody else on it. We still have men on the job today.

I might state the man on the job today is putting out three times as much work as Mr. Frederick did. He didn't like his job. He duffed off on that. From management's standpoint, we were aware of it. You try to give a man a chance.

Mr. Frederick was laid off for about a nine- or ten-day period. The explanation sometimes, when you lay a man off, is due to the fact that there may be a multiple of reasons, such as he is sloppy in his work, he refuses to do his job.

Mr. Harrington: I object to this narrative form of testimony.

Trial Examiner Royster: I will sustain the objection.

Q. (By Mr. Simpson): Tell us what reason Mr. Frederick was laid off the job for?

A. The immediate reason——

(Testimony of Elwood C. Martin.)

Mr. Harrington: Did you lay Mr. Frederick off?

The Witness: No, sir.

Mr. Harrington: I object to the question as to why he was laid off.

Trial Examiner Royster: He still may have been concerned in the layoff.

The Witness: I am concerned in the layoff, because I can [183] say yes or no.

Q. (By Mr. Simpson): What did you have to do with his layoff?

A. I told Mr. Gilly to go ahead and use his own judgment. When I said that I meant that was O.K.

Q. I don't mean at the time you discharged him, but at the time he was laid off.

A. Mr. Gilly reported to me in my office. He said, "They have gone too far." The gist of the situation was that Mr. Frederick had no more interest in his job. He went against instructions. He was told to put this bar on, repair this machine and put the set screw into the bar, as it should be.

Q. Aren't you talking now about the time he was discharged? A. Yes.

Q. Or his previous layoff?

A. No. I am talking now about the time he was discharged.

Q. All right.

A. I skipped there; I am sorry.

Q. Let's go ahead with what you are talking about; previous to his discharge, and we will go back to the other.

A. He had a layoff period—you mean about the nine- or ten-day layoff period?

(Testimony of Elwood C. Martin.)

Q. Yes.

A. All right. We had a slacking of materials.

Mr. Harrington: Now, what is the testimony with respect to, counsel, the layoff or discharge?

Mr. Simpson: We are talking about the layoff.

Mr. Harrington: The witness evidently wasn't.

Mr. Simpson: He is now. I hope he is. That is what I asked him about.

The Witness: We are talking about the second layoff.

Q. (By Mr. Simpson): Was he laid off more than once? A. Twice.

Q. Let's distinguish between layoffs and discharges. Was he laid off once or more than once?

A. Twice.

Q. What was the reason for his first layoff?

A. The reason for his first layoff was mainly a cutback on that program and the fact that he wasn't capable of being shifted onto another job at the time. So it necessitated a layoff.

Q. Was there a later layoff?

A. Yes, there was another one after that.

Q. What was the reason for that?

A. The reason for that was mainly getting sloppy. Now, he had been sloppy prior to the first layoff. However, he got progressively worse and he was laid off at that time; he was talking about going to school part time, also.

He came back to work in, I think it was, the first of September, 1950, I think on a part-time basis, and he had done some part-time work before then,

(Testimony of Elwood C. Martin.)
too. But he came back at that [185] time and I talked to Mr. Frederick——

Mr. Harrington: When was that now, September 1950?

The Witness: I think it was—no, wait a minute. January 9, 19——

Mr. Harrington: I am sorry to interrupt.

The Witness: It was—I can't remember exactly. I have looked at the date. It was either 1-9——

Trial Examiner Royster: Are you trying to remember what you saw in a record some place, or is this your recollection of the time he came back to work?

The Witness: I am trying to remember when he came back to work. The only way I can remember it is to try to associate it with a program we were running at the time.

Q. (By Mr. Simpson): If you can't remember the specific dates, tell us what happened.

A. Mr. Frederick came back to me. He had been off around ten days. He came back and said that he wanted to continue with his schooling, that he knew he hadn't done too good a job, but if I would give him another chance to help him out to go to school, on a part-time basis—he was married at the time, or getting married—why, he would do a good job for us.

Q. Did you rehire him then?

A. Yes, I hired him, to help him out. That was the main reason.

Q. What kind of work was he assigned? [186]

(Testimony of Elwood C. Martin.)

A. He came back on that time and he went on carbons, and back on some of this jack work, if I remember correctly.

Q. You had a conversation with Mr. Gilly, I believe you said, in late November or early December? A. That is right.

Q. Concerning the carbon job?

A. Yes. I think it was around three weeks before he was laid off.

Q. You mean before he was discharged?

A. Before he was discharged.

Q. Now, have you told us the conversation you had with Mr. Gilly on that occasion?

A. Mr. Gilly came into my office and stated to me that Frederick had refused to go to work on carbons. That he wasn't qualified to put on another job, especially while his attitude was the way it was.

I said, "Ed, I don't like to lay him off just before Christmas. It looks bad as a company policy. And we just don't like to do it."

We only did it once before for a man stealing. We let him out on the spot. That was this year.

At that time I said, "See if you can keep him busy until after the holidays."

Ed didn't appreciate it very much, I know that. So he let him help on some tooling, and it was right after that, while he [187] was helping on this tooling, that he was working on this Potter & Johnston, and used the sledge hammer.

At that time Ed came up to my office. That was about a week before his final discharge. Mr. Gilly

(Testimony of Elwood C. Martin.)

came up to my office and said that he was upset—he didn't say he was upset, but he was upset.

Mr. Harrington: I am going to object——

Q. (By Mr. Simpson): Tell us what he said.

Trail Examiner Royster: I will let it go out, that he was upset. Just tell us what he said.

The Witness: That he had just given Mr. Frederick instructions to stop beating the machines up with sledge hammers. To take the drum out of the machine, under the operation that was being done on the machine, fitting a cam, and take the drum out of the machine and find out what was hanging it up, and clean and oil it and find out what was wrong, and not to beat the threads off.

He said he went back by the machine a few minutes later and he was again using the sledge hammer. At that time, if I remember correctly, something upset the conversation, or probably there would have been a layoff at that time.

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: I will let it go out.

Q. (By Mr. Simpson): Did anything else occur?

A. Then it was around a week later, I think it was, Ed again [188] came into my office and stated that he was at his wit's end. Mr. Frederick had disregarded instructions again, and had gone to work on this machine, on a repair job, to fit this new tool holder and had broken the tool holder.

He stated he wanted to lay him off.

(Testimony of Elwood C. Martin.)

I told him to go ahead, or, "O.K., it is up to you."

Consequently, he had his check made out.

Q. Was the reason that you gave authority to Mr. Gilly to discharge Mr. Frederick because of these reports that you had received from Mr. Gilly?

A. Absolutely; as well as personal observation.

Q. Did your O.K. of his discharge have anything to do whatsoever with any union activities of Mr. Frederick? A. Absolutely not.

Q. Did you know he was engaged in any union activities? A. I did not.

Q. When was the first time you heard about it?

A. When Mr. Grisham phoned Mr. Nemec.

Q. When was that?

A. That was right after Mr. Frederick was laid off. I was in Mr. Nemec's office.

Mr. Harrington: I am going to object——

Q. (By Mr. Simpson): When was it?

A. It was within a three-day period, I am sure.

Q. After he was discharged? [189]

A. After he was discharged. Mr. Grisham——

Q. Who is Mr. Grisham?

A. Mr. Grisham is the union organizer sent out from the east, to help get the UAW-AFL in business out here.

Q. He had a conversation, did he, with Mr. Nemec, or you? A. With Mr. Nemec.

Q. In your presence? A. Yes, I was there.

Q. What was said about Mr. Frederick?

A. He stated to Mr. Nemec he couldn't lay him

(Testimony of Elwood C. Martin.)
off, that Mr. Frederick was a union organizer in our plant. That was the first time I knew and the first time Mr. Nemec knew Mr. Frederick was having anything to do with any organization.

Mr. Harrington: I object to the witness' characterization of "the first time Mr. Nemec knew."

Trial Examiner Royster: All right. I will let that go out.

Q. (By Mr. Simpson): That was the first time you knew that he had anything to do with union activities? A. Yes.

Mr. Simpson: I think that is all.

Cross Examination

Q. (By Mr. Harrington): Now, you testified that Mr. Frederick was always sloppy about keeping his machine clean. Was that all the time that he worked for the company? [190]

A. No. I stated that when he first came to work for us he did fairly well.

Q. When did he start getting sloppy?

A. Just prior to his first layoff. It was more of a cutback on material, actually, that laid him off.

Q. When was that layoff? Can you place it by year? A. Pardon me?

Q. Can you place it by year? What year did it occur in?

A. That goes back to that hub schedule, axle schedule. It must have been around '47.

Q. 1947?

A. Yes, '47, '48; I am not sure on that.

(Testimony of Elwood C. Martin.)

Q. Now, you state that a sign was put on Frederick's machine about keeping it clean?

A. Yes.

Q. What machine was that?

A. Well, he was running a Potter & Johnston part of the time. There was a sign put on that several times. He was running a hydraulic——

Q. When was he running the Potter & Johnston machine? A. During that period.

Q. What period?

A. Well, when he started work there, from '46 through '47, or '48.

Q. That is when the sign was put on his machine? [191]

A. Yes; during the period between when he came to work for us and the first time he was laid off.

Q. Did anybody else work that machine at that same time?

A. Yes; not very often. There was also a hydraulic machine we had built up ourselves during the war—there were several on it, actually, and he was running those machines. In fact, he was running one there practically exclusively, and that had had signs on it several times.

Q. How long did he continue to run that machine?

A. Off and on for a period of several years.

Q. Well, he ran it up until the time he was laid off, did he?

A. Yes, the time of the first layoff; when he

(Testimony of Elwood C. Martin.)

came back he ran those machines again, same machines, off and on.

Q. Other employees also ran those machines, did they not?

A. After he came back I don't think the other employees ran them.

Q. How long did he continue to run it?

A. Well, he ran those machines off and on during the period of his first layoff and his second layoff.

Q. He was only working part time then, wasn't he?

A. I think part of that period he was on a full-time basis.

Q. When he worked part-time basis, did anybody else work the machine? A. No.

Q. The machine stayed idle when he wasn't there? [192]

A. That is right. We were under our production on that work. He was also during that period on this jack work I mentioned, for Jumbo Steel; he was operating on some of that.

Q. When did Gilly tell you that Frederick said he would quit if he had to work on carbons?

A. Well, that was about three weeks before his final discharge.

Q. How long had Frederick worked on carbons, do you know?

A. Oh, off and on for a year or so; maybe longer.

Q. Now, the carbons was not a full-time job, was it?

(Testimony of Elwood C. Martin.)

A. No. May have been full time for him on a lot of days, when he came in for 3½ hours or 4 hours. He used to average, when he worked part time, from 10 to 20 hours a week, maybe 14, 16 hours.

Q. Work was not done on carbons every day of the week?

A. Not every day. There were periods when maybe it was done every other day for several months.

Q. And then periods when it was done only a few days a week? A. That is right.

Q. Did anybody else work on carbons?

A. Not on his operation at the time—yes, there were other people capable of doing it. They wouldn't be on it over two or three per cent of the time. They also kept their machines clean when they finished.

Q. Now, wasn't a man put full-time, put working full time on [193] carbons?

A. Yes; we have one full time now.

Q. When was the man put on full time?

A. After Mr. Frederick left.

Q. There was nobody working full time on that machine before Mr. Frederick left?

A. He probably worked on it full time, part of the time.

Q. You mean he worked on it full time part of the time? What do you mean?

A. I can look at the schedule and see what we ship, and I could tell you the time.

Q. You mean to tell me you can't tell when a man was putting full time on that machine?

(Testimony of Elwood C. Martin.)

A. We have job cards. We can dig back and find out what he was doing.

Q. You don't know now of your own knowledge?

A. He was working more or less full time on the carbons, until he refused to work——

Q. Just a moment. I am asking if a man was put full time on the machine working carbons.

A. During what period?

Q. At any time. A. Yes.

Q. When? A. Right now. [194]

Q. When was he put on it?

A. After Mr. Frederick refused to run it.

Q. Wasn't there a man put working full time on carbons in September or October of 1950?

A. No. He was put on carbons about three weeks before Mr. Frederick was discharged.

Q. Another man was put working on the carbons?

A. That is right. At that time our production started increasing.

Q. And a man was put working full time on the carbons? A. That is right.

Q. Now, do you recall when was the second time that Mr. Frederick was laid off? I believe you testified he was laid off twice, once when there was a cutback——

A. He came back after the cutback and I think he worked nine or ten days, something like that, a short period of time. It might have been two weeks. I can't remember exactly.

Q. When was that? Can you remember? What

(Testimony of Elwood C. Martin.)

year was it? I don't expect you to remember the exact day.

A. I am getting confused on the years. Can we stick to the periods?

Q. I don't think the period would give anybody reading this record a clear idea of time.

A. We have records on when he worked for us. I remember the times he worked, why he was laid off and why he was rehired. [195]

Q. Can you remember the second time he was laid off? Was that either in 1949 or 1950?

A. It wasn't in 1950, I am sure of that.

Q. Was it 1949?

A. I imagine. It could have been '48 or '49; I am confused on it now.

Q. You testified that when he came back, after that second layoff, that you put him working on carbons? A. Yes.

Q. How long did he work on carbons?

A. He was on that some time. Up until a short time before he was discharged.

Q. Would that be for a space of from 1948 to December of 1950?

A. Wait a minute. We didn't run too heavy on the program then. He was on the jack work—was going on in that period, too, as well as some carbons.

Q. Did he do both types of work in that period?

A. Mainly carbons. If I remember correctly now, we are back to a full-time deal. It may be that he would run a day on carbons and another day on

(Testimony of Elwood C. Martin.)

something else. Our production then was probably a hundred units a day.

Q. Then it would be your testimony that after he came back the second time, he did work on carbons? A. Yes, definitely. [196]

Q. Sometimes full time and other times maybe one or two days a week? A. That is right.

Q. Up until December of 1950, is that right?

A. Within three weeks or so before he was discharged.

Q. You testified that about three weeks before his discharge Gilly told you Mr. Frederick had refused to work on carbons? A. Yes.

Q. Where was that conversation with Mr. Gilly?

A. My office.

Q. Was anybody else present? A. No.

Q. You told Mr. Gilly not to lay him off during the holiday season? A. That is right.

Q. What type of work was he put on then?

A. He was helping on some tooling and maintenance.

Q. When was it that Mr. Gilly told you about this sledge hammer?

A. About a week before he was laid off.

Q. Did Mr. Gilly ever after that say anything else to you about Mr. Frederick using the sledge hammer?

A. Well, I think we went—we probably discussed his final layoff over this. He probably mentioned it again; I can't be sure of that. [197]

Q. Now, in this conversation that Mr. Nemec

(Testimony of Elwood C. Martin.)
had with Mr. Grisham, was that a telephone conversation? A. Yes.

Q. Did you participate in that conversation?

A. I was sitting right across the desk from him.

Q. You heard Mr. Nemec's part of the conversation, is that it?

A. I was warned as to what he said afterwards, when he turned around——

Q. What who said afterwards?

A. Mr. Nemec.

Q. When you were testifying on direct examination, were you testifying to a conversation between you and Mr. Nemec, or between you and Mr. Nemec and Mr. Grisham?

A. I was saying what Mr. Grisham told Mr. Nemec.

Q. You didn't hear him talk to Mr. Nemec?

A. No. But he turned around and told me what he said.

Q. Then the testimony you gave is testimony of what Mr. Nemec told you that Mr. Grisham said?

A. That is right.

Q. What did Mr. Nemec say in that conversation to Mr. Grisham?

A. If I remember correctly, it was something about, "We are still running our plant," and that he didn't know that there was any organizational activity going on within our plant. [198]

Q. What date was that conversation?

A. It was a period of within one to three days after Frederick was discharged. I don't remember

(Testimony of Elwood C. Martin.)
whether it was the next day or the day after that, or the day after that.

Q. Did Mr. Gilly explain to you the details of this machine, of what happened to this machine that Mr. Frederick was working on the day of his discharge? A. Yes.

Q. What did he tell you about it?

A. He told him to put a set screw into the bar. He went ahead and hadn't followed instructions and tried to clamp the bar in, screwed down the bolts, set screws, or whatever there was in it, so tight that it broke the casting.

Q. Now, after the second layoff did Mr. Frederick come back to the plant to get his withholding statement or income tax, do you remember? And didn't you ask him at that time to come in and help out? Do you remember that?

A. I don't remember that, no.

Q. Now, in pulling a drum off a Potter & Johnston machine, does it take a great deal of pressure to pull the drum off?

A. Sometimes it does, yes.

Q. How is the drum taken off? Is there a machine to take the drum off with?

A. Yes, like a wheel puller.

Q. Is that called a puller? [199]

A. Yes, a three-finger deal, like you pull a hub off a car when stuck.

Q. Does it take extreme pressure sometimes to put the drum back on?

A. Sometimes, but if the machine is cleaned

(Testimony of Elwood C. Martin.)
good and everything made to fit right, which it should be, it will go back on.

Q. It is true that sometimes it takes a lot of pressure to put it back on?

A. I would say yes. On a poor job, yes, it could take a lot of pressure. On a good job, no; the thing was on there before and it just came out and it should go back in.

Q. What did he take it out for?

A. Put a cam on it.

Q. What is a cam?

A. Like a shoe. Your drum revolves and you have a roller that rolls against you and this works another mechanism; a transfer deal. You never beat directly on any machine with a hammer or sledge hammer. You get some soft material that won't ruin the machine.

Q. Such as a wood block?

A. Wood block or piece of brass. It depends on the piece of material you are working on and the strength it has.

Q. How long did this telephone conversation between Grisham and Mr. Nemec last?

A. If I remember, it was fairly short. They didn't have very [200] much to talk about. We didn't have a union.

Q. Isn't it true that it lasted about an hour?

A. I don't think so. There was some discussion and probably some——

Q. What would not having a union have to do with the length of it? A. What is it?

(Testimony of Elwood C. Martin.)

Q. Did I understand you to say it was fairly short because you didn't have a union?

A. Well, the conversation, so far as Frederick's discharge was concerned, what there would be that would cause it to be particularly long to discuss about it. I don't exactly remember the length of the conversation. I remember the results. It was a surprise to us both.

Mr. Harrington: I have no further questions.

Mr. Simpson: I don't think of any further questions.

Trial Examiner Royster: All right. That is all.

(Witness excused.)

* * * * * [201]

Tuesday, Jan. 22, 1952

Trial Examiner Royster: On the record.

Mr. Simpson: Mrs. Nemec.

BESS L. NEMEC

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): Will you state your name, please? A. Bess L. Nemec.

Q. Are you the wife of Fred Nemec?

A. Yes.

Q. Do you work at the Nemec Combustion Engineers? A. Yes.

Q. How long have you worked there?

A. Well, since 1926, when we started business.

(Testimony of Bess L. Nemec.)

Q. Have you worked there continuously to and including the present time? A. Yes.

Q. What particular work do you do there?

A. I am office manager.

Q. Were you office manager in the year 1950?

A. I was.

Q. Do you recall an employee, who worked at Nemec Combustion Engineers in the latter part of 1950, by the name of Clarence Leeper? [204]

A. I do.

Q. He worked in the welding department?

A. That is correct.

Q. Did you have occasion in December 1950 to sign, on behalf of Nemec Combustion Engineers, two checks jayable to Mr. Leeper for wages?

A. Yes.

Q. I show you General Counsel's Exhibit 2, which appears to be the bottom of a payroll check.

A. That is correct.

Q. It shows the hours worked, straight time and overtime, the rate, total compensation for the period from 12-21-50 to 12-27-50, inclusive, the date of the check being 12-27-50, and to the signature there of Nemec Combustion Engineers by B. L. Nemec. Is that signature, "B. L. Nemec," your signature?

A. That is my signature.

Q. And the notation that employment was terminated? A. That is right.

Q. Did you fill out this check, of which this Exhibit 2 is a part? A. Yes.

Q. And signed it? A. Yes.

(Testimony of Bess L. Nemec.)

Q. Do you know what you did with it after you had signed it?

A. Why, Mr. Nemec took it down to Mr. Leeper.

Q. You gave it to Mr. Nemec?

A. That is right.

Q. Now I show you General Counsel's Exhibit 3, which is a similar instrument as to form, except that it shows four straight hours with an asterisk indicating that is call-in pay, and employment was terminated, dated the 28th day of December, and signed B. L. Nemec. A. Yes.

Q. Is that your signature? A. Yes.

Q. Did you make out the check, of which that was a part? A. I did.

Q. What did you do with it?

A. I took it upstairs to Mr. Nemec's office, where Mr. Leeper was sitting.

Q. Was Mr. Nemec in his office when Mr. Leeper was there? A. Yes.

Q. Were they engaged in any conversation, so far as you recall?

A. Oh, yes. They had had about an hour—had had quite a little conversation. I can't recall just the exact hour I took it up. It was along in the early part of the conversation.

Q. Did you take it up there at the suggestion or request of someone else?

A. Mr. Nemec, yes. [206]

Q. Did you stay and listen to any of the conversation between Mr. Nemec and Mr. Leeper?

A. Well, I stood there a few minutes, when he

(Testimony of Bess L. Nemec.)
asked me to make out the check, because I knew Mr. Leeper had quit.

* * * * * [207]

Q. At any time that day you didn't hear anything between Mr. Nemec and Mr. Leeper about Mr. Leeper having quit, is that correct?

A. You mean up until the time I made out the check?

Q. Yes.

A. No. All Mr. Nemec said to me, when I came in the office——

Trial Examiner Royster: That is not the question. When Mr. Leeper was present, did you hear Mr. Nemec say this in the presence of Mr. Leeper?

The Witness: Mr. Leeper was sitting up in the office, talking to Mr. Nemec. I was called in and Mr. Nemec turned to me and said, "Make a check for four hours. Mr. Leeper contends he was inconvenienced to come up here and pick up his check. Give him four hours."

I went down and made the check, and took it back up.

Q. (By Mr. Simpson): Do you recall having had a telephone conversation with Mr. Leeper in the latter part of December, 1950, after you had made out this check, Exhibit 2?

A. Yes, the next morning——

Q. When was that, approximately?

A. Well, to the best of my recollection it was about, I [208] would say, 11:00 o'clock the next morning, on about the 29th of December.

(Testimony of Bess L. Nemec.)

Q. Did you call Mr. Leeper or did Mr. Leeper call the office and talk to you?

A. He phoned me or phoned the office from a pay station, and I answered.

Q. How do you know he was phoning from a pay station?

A. I could hear the nickels drop in.

Q. Did you ask him where he was calling from?

A. Well, along in the conversation I asked him. I said, "Where are you calling from?" I thought it would be strange that he would be calling me from a pay station.

He said, "I am calling from a pay station."

That is how I knew he was calling from a pay station.

Q. Will you relate that conversation?

A. Well, to the best of my memory, he called, and I seem to recal he was tipping us off or tattling to us, trying——

Mr. Harrington: I object to this characterization, Mr. Examiner.

Trial Examiner Royster: All right. Just tell us what he said, to the best of your recollection.

Mr. Harrington: These are conclusions of the witness.

The Witness: I was just trying to tell you my reaction. He was tipping us off——

Q. (By Mr. Simpson): We don't want your reaction. We want [209] you to tell us, as nearly as you can, what he said to you and what you said

(Testimony of Bess L. Nemec.)

to him. The Trial Examiner can conclude whether he was tipping you off or tattling, or whatever he did. A. He was tipping us off——

Trial Examiner Royster: Let her alone. Go ahead.

The Witness: I don't know what other word to use. He was informing us——

Mr. Harrington: May I have a standing objection to all of this?

Trial Examiner Royster: Yes.

Q. (By Mr. Simpson): Did he tell you he was tipping you off or informing you of something? If he didn't, don't use the expression.

A. He called up to tell us that some of our employees had been waiting outside in a car the night before, while he was in conversation with Mr. Nemec, I would say, for an hour and a half. They had been waiting all that time to find out how he came out with his conversation with Mr. Nemec, and that he had told them that we were reasonable people and that any differences that they might have could be settled very reasonably with us, because we were reasonable people.

That there would be no need for them to go to the union meeting, which he said they were sitting out there to go to. And that he has been a sort of a missionary and he was trying to get them not to organize. He was trying to get them not to [210] go to the union with any grievances, because we were not union and he didn't see any need to go to

(Testimony of Bess L. Nemec.)
the union; we were reasonable people, and anything could be settled.

Q. Is that the substance of what you recall that Mr. Leeper told you in that conversation?

A. Yes, that is all I recall.

Q. Did you have any other telephone conversation with him after that, that you remember?

A. Well, I have many conversations over the phone with a lot of people. The only conversation I can ever recall of having talked to him at all was some time after that, after he quit.

Mr. Harrington: I object to the characterization "after he quit."

Trial Examiner Royster: I will let it stand. We know there is a dispute about it.

The Witness: And he called up to see if the boys had made any decision to let him have his job back. He was trying to get back. He wanted to work for us again.

Q. (By Mr. Simpson): Do you recall what you told him?

A. Well, all I can remember saying is they had made no decision, so far as I knew.

Q. Did you know Mr. Thomas Frederick?

A. Yes.

Q. He worked at the Nemec Combustion Engineers? A. That is correct. [211]

Q. Do you recall any incident where Mr. Frederick was standing out in back of the plant with several other employees, handing around papers of any kind?

(Testimony of Bess L. Nemec.)

A. I have never seen him hand out any papers.

Q. Where is your office located in the plant?

A. Well, it is in the front of the building.

Q. From your office, is there any way in which you can see out into the plant?

A. Oh, yes. Well, not from my office. When I am upstairs in the other offices there are windows, I can look down over the plant.

Q. Do you and did you in the year 1950 go through the plant at any time?

A. I often go through the plant. I have to take messages down. I have to contact the boys. At that time we had no intercommunication system, and I often went down into the plant.

Q. Did you have any occasion to observe Mr. Frederick in the latter part of 1950, in the manner in which he was carrying on or not carrying on his work?

A. Oh, yes, I have seen him many, many times.

Q. What did you observe him doing or not doing?

A. Well, for the last two or three months I felt he was gold-bricking something awful on the job. And I would see him, he would move very slowly. He seemed indifferent to his work.

Q. Did you make any report of that to Mr. Nemec or anyone [212] else?

A. Oh, yes. I am not a person given to any strong language, but I had told Mr. Nemec on many occasions, "My God, you ought to do something about that man. He is gold-bricking something aw-

(Testimony of Bess L. Nemec.)

ful." I had told Mr. Nemec that for two or three months.

Q. Did you at any time prior to Mr. Frederick's discharge have any knowledge or information he was engaged in any kind of union activities?

A. No, none whatever.

Q. When was the first occasion you learned of that?

A. Well, the first occasion that I knew of it was when I was sitting in Mr. Nemec's office two or three days after Mr. Frederick's termination. Some union official had called Mr. Nemec on the phone and told him that Mr. Frederick was——

Mr. Harrington: I object to what the union official told. It was a telephone conversation. She heard from somebody she identified as a union official.

Trial Examiner Royster: The question is when she learned he had anything to do with the union. It doesn't matter how she learned it. I will overrule the objection.

The Witness: It was about two or three days after he was terminated. That is the first we knew about it. We practically fell flat on our face. We didn't have any idea he had any connection with the union.

* * * * * [213]

Cross Examination

Q. (By Mr. Harrington): When Mr. Nemec said to make out this check for four hours, that Mr.

(Testimony of Bess L. Nemec.)
Leeper said he was inconvenienced, did he say what the inconvenience was?

A. No. Mr. Nemec said that Mr. Leeper felt—I hesitated a minute, because I knew Mr. Leeper had quit and I didn't feel like he needed it.

Q. Just a moment. Answer my question.

A. Will you repeat it again?

Q. Did he say why Mr. Leeper was inconvenienced?

A. No. He just said he felt he had been inconvenienced.

Q. Now, this telephone conversation that you testified to a few days later, that would be the second phone conversation. Do you recall which one I have in mind now. You testified there were two phone conversations, one on December 29th and one sometime later.

A. Later. I don't recall just the date.

Q. I am referring now to this one later, this second one later. Just what was said in that conversation?

A. Well, I can't recall any of the conversation, except that he was asking for his job back. He was asking if the boys had made any decision if he could have his job back.

Q. That is all you recall of the conversation?

A. That is all I recall, yes, sir.

Q. Now, you testified that you had never seen Frederick hand [214] out any papers.

A. No, I never saw him pass out any papers.

Q. You had seen Mr. Frederick in the company

(Testimony of Bess L. Nemec.)

of Mr. Pounds, though, had you not?

A. Well, I don't recall. It seems to me that he stood out in front, passing out handbills, after he was terminated.

Now, I thought your question was while he was working for us did I see him pass out any papers.

Q. That was my question—wait a minute. That wasn't exactly my question. I was referring to while he was working for you, did you not see him with Mr. Pounds?

A. While he was working, never.

* * * * *

Q. Are you an expert on machine work, Mrs. Nemec? A. Am I an expert?

Q. Yes.

A. No, I am not an expert on tolerances and things like that. I know when a man is working and when he isn't.

* * * * * [215]

Mr. Simpson: Ray Nemec.

RAYMOND NEMEC

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Simpson): State your name.

A. Raymond Nemec.

Q. Are you the son of Fred and Bess Nemec?

A. That is right.

(Testimony of Raymond Nemec.)

Q. Are you employed at the Nemec Combustion Engineers?

A. That is right.

Q. Were you so employed in the year 1950?

A. Yes, I was.

Q. What particular type of work do you do there? [216]

A. I was director of materials, purchasing.

Q. Do you know or did you know Mr. Clarence Leeper?

A. Yes.

Q. Directing your attention to the 28th of December, 1950, did you see Mr. Leeper in your father's office at Nemec Combustion Engineers?

A. Yes, I did.

Q. About what time of the day was it?

A. It was about 5:00 o'clock or approximately.

Q. Had he been there waiting for your father?

A. Yes, he had.

Q. Where did he wait?

A. He waited in his office.

Q. Where is your office with reference to your father's office.

A. Just across the hall, from the door.

Q. Did you have any occasion to go into your father's office that afternoon while your father and Mr. Leeper were in your father's office?

A. Yes, I was in there, oh, possibly two or three times.

Q. Did you hear any of the conversation that the two of them were having?

(Testimony of Raymond Nemec.)

A. I got bits of it, yes.

Q. Will you please tell us what parts of the conversation you heard between Mr. Leeper and Mr. Nemec?

* * * * * [217]

The Witness: One of the parts when I first was in there, as I recall, he was stating——

Q. (By Mr. Simpson): Who was?

A. Mr. Leeper was talking, oh, over the general conditions in the welding shop, of more or less the attitude of the men.

And in another instance he was stating that he felt that he deserved the four hours call-in pay; and I didn't think much of the idea.

Mr. Harrington: I object to that, Mr. Examiner.

Trial Examiner Royster: That may go out.

Q. (By Mr. Simpson): State, as near as you can remember, what was said.

A. He stated that he felt he deserved the call-in pay. After Mr. Nemec stated he felt he didn't, Mr. Leeper stated he felt he did, because of the inconvenience caused him by [218] coming down to pick up his check and his equipment.

Q. Anything else?

A. No.

Q. Did you know Mr. Thomas Frederick while he was working there?

A. Yes.

Q. At any time that Mr. Frederick was employed at Nemec Combustion Engineers, did you see him passing out any cards or handbills?

(Testimony of Raymond Nemec.)

A. No, I didn't.

Q. Did you know whether he was or not engaged in any union activities?

A. No, I didn't.

* * * * * [219]

[Endorsed]: No. 13690. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, a co-partnership doing business as Nemec Combustion Engineers, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: January 20, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13690

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ELWOOD C. MARTIN, FRED A. NEMEC, and ROBERT W. NEMEC, a co-partnership d/b/a NEMEC COMBUSTION ENGINEERS,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V., Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership d/b/a Nemec Combustion Engineers, Whittier, California, and their agents, officers, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership d/b/a Nemec Combus-

tion Engineers and International Union, United Automobile Workers of America, AFL, Case No. 21-CA-1022."

In support of this petition the Board respectfully shows:

(1) Respondents, a co-partnership, are engaged in business in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on September 11, 1952, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, and their agents, officers, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and

that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondents, and their agents, officers, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 16th day of January, 1953.

NATIONAL LABOR RELATIONS BOARD,
/s/ By A. NORMAN SOMERS,
Assistant General Counsel

[Endorsed]: Filed Jan. 20. 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner National Labor Relations Board will urge and rely on the following points:

1. The Board properly found that respondent discharged employees Clarence Leeper and Thomas Frederick in violation of Section 8 (a) (1) and (3) of the Act.

2. The Board's order is proper and valid.

Dated at Washington, D. C., this 16th day of January, 1953.

/s/ By A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed Jan. 20, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER TO SHOW CAUSE

United States of America—ss.

The President of the United States of America:

To: Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, a co-partnership d/b/a Nemec Combustion Engineers, 2430 West Whittier Blvd., Whittier, Calif., and Int. Union; United Automobile Workers of America, AFL.; Att.: William Pounds, 6308 Pacific Blvd., Huntington Park, Calif.,

Greeting:

Pursuant to the provisions of Subdivision (e) of Section 160, U.S.C.A. Title 29 (National Labor Relations Board Act, Section 10(e)), you and each of you are hereby notified that on the 20th day of January, 1953, a petition of the National Labor Relations Board for enforcement of its order entered on September 11, 1952, in a proceeding known

upon the records of the said Board as "In the Matter of Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, a co-partnership d/b/a Nemec Combustion Engineers and International Union, United Automobile Workers of America, AFL, Case No. 21-CA-1022," and for entry of a decree by the United States Court of Appeals for the Ninth Circuit, was filed in the said United States Court of Appeals for the Ninth Circuit, copy of which said petition is attached hereto.

You are also notified to appear and move upon, answer or plead to said petition within ten days from date of the service hereof, or in default of such action the said Court of Appeals for the Ninth Circuit will enter such decree as it deems just and proper in the premises.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, this 20th day of January in the year of our Lord one thousand, nine hundred and fifty-three.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Return on Service of Writs attached.

[Endorsed]: Filed Jan. 27, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF RESPONDENTS ELWOOD C. MARTIN, et al., AND STATEMENT OF POINTS

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, a co-partnership, doing business as Nemec Combustion Engineers, respondents in the above entitled matter, answer the petition presented to this Honorable Court for the enforcement of a certain order issued by the National Labor Relations Board against these respondents in Board Case 21-CA-1022, and state as follows:

1. Admit the allegations of paragraphs numbered (1) of the said petition, except that respondents deny the commission of any unfair labor practices by respondents as therein alleged, and deny that this Court or the National Labor Relations Board had or have jurisdiction of said petition or of the said proceedings before the Board.

2. Admit the allegations of paragraph numbered (2) of said petition, except that respondents deny that the proceedings before the said Board in said matter were "due proceedings", and allege that the said Board was without jurisdiction in said proceedings and without power of jurisdiction to make the order purportedly made by it, because the complaint in said proceedings was issued upon alleged

unfair labor practices occurring more than six months prior to the filing of said complaint and a service of a copy thereof.

3. Answering paragraph (3) of said petition respondents state that they have received a copy of documents filed with this Court stating that the said Board was certifying and filing with the Court the documents described in the Certificate of the said Board.

4. Further answering the said petition respondents state that the prayer of the said petition should be denied and the said proceeding dismissed for the following reasons:

(a) That the said Board was without jurisdiction and power to entertain said proceedings or make the order made by the Board, because the complaint was filed with the Board November 14, 1951, and was based on alleged unfair labor practices allegedly occurring on December 28, 1950, which was more than six months prior to the filing of the said complaint, and by reason thereof said proceedings and order are void under the provisions of §10(b) of the Labor Management Relations Act, 29 USCA §160(b).

(b) That the order of the Board is not supported by and is contrary to the findings and the findings are contrary to and not supported by evidence.

Wherefore, respondents pray that the petition of the National Labor Relations Board be denied, that this Court make an order vacating and setting aside

the Board's said order, and for such further order as to this Court may seem just and proper.

Dated: January 29, 1953.

R. D. SWEENEY and
J. E. SIMPSON,
/s/ By J. E. SIMPSON,
Attorneys for Respondents

Duly Verified.

Statement of Points Upon Which Respondents Intend To Rely

In this proceeding respondents will rely upon the following points:

1. That the National Labor Relations Board is without power or jurisdiction to issue the complaint, entertain the said proceedings, or make the order made by it, because the said complaint was filed more than six months after the alleged occurrence of the alleged unfair labor practices.

2. That the order is contrary to the findings.

3. That the findings are contrary to and not supported by the evidence.

4. That the conclusions of the Examiner adopted by the Board are contrary to and not supported by the findings or evidence.

5. That the order is contrary to the evidence.

6. That the findings, conclusions, and order are based upon charges which were dismissed at the

hearing and respondents thereby deprived of the opportunity of reviewing the same.

Dated: January 29, 1953.

R. D. SWEENEY and
J. E. SIMPSON
/s/ By J. E. SIMPSON,
Attorneys for Respondents

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 30, 1953. Paul P. O'Brien, Clerk.

No. 13690

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

JUN 2 8 1953

PAUL P. O'BRIEN

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AUTHORITIES CITED

Cases:

Angwell Curtain Co. v. *N.L.R.B.*, 192 F. 2d 899 (C.A. 7) 13

E. Anthony & Sons Inc. v. *N.L.R.B.*, 163 F. 2d 22 (C.A.D.C.), certiorari denied, 332 U.S. 773 15

Cathey Lumber Company, 86 NLRB 157, affirmed 185 F. 2d 1021 (C.A. 5), vacated on other grounds, 189 F. 2d 428 24

Cases—Continued

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Consolidated Edison Co. v. *N.L.R.B.*, 305 U.S. 197 23
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Cusano v. *N.L.R.B.*, 190 F. 2d 898 (C.A. 3) 26
Fort Wayne Corrugated Paper Co. v. *N.L.R.B.*, 111 F. 2d 869 (C.A. 7) 23
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Modern Motors v. *N.L.R.B.*, 198 F. 2d 925 (C.A. 8) 21
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N.L.R.B. v. *American Creosoting Co., Inc.*, 139 F. 2d 193 (C.A. 6), certiorari denied, 321 U.S. 797 23
N.L.R.B. v. *Bird Machine Co.*, 161 F. 2d 589 (C.A. 1) 14
N.L.R.B. v. *J. G. Boswell Co.*, 136 F. 2d 585 (C.A. 9) 14, 20
N.L.R.B. v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C.A. 7) . 26
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N.L.R.B. v. *Dinion Coil Co.*, 201 F. 2d 484 (C.A. 2) 14, 26
N.L.R.B. v. *Gaynor News Co.*, 197 F. 2d 719 (C.A. 2), certiorari granted, 345 U.S. 902 26
N.L.R.B. v. *Globe Wireless, Ltd.*, 193 F. 2d 748 (C.A. 9) 17, 27
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N.L.R.B. v. *Kanmak Mills, Inc.*, 200 F. 2d 542 (C.A. 3) 25
N.L.R.B. v. *Kennametal, Inc.*, 182 F. 2d 817 (C.A. 3) 21
N.L.R.B. v. *Kingston Cake Co.*, 191 F. 2d 563 (C.A. 3) 23, 26
N.L.R.B. v. *Kobritz*, 193 F. 2d 8 (C.A. 1) 26
N.L.R.B. v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 15
N.L.R.B. v. *Nu-Car Carriers*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U.S. 919 21
N.L.R.B. v. *Smith Victory Corp.*, 190 F. 2d 56 (C.A. 2) 14
N.L.R.B. v. *State Center Warehouse*, 193 F. 2d 156 (C.A. 9) .. 15
N.L.R.B. v. *Stowe Spinning Company*, 165 F. 2d 609 (C.A. 4), certiorari denied, 334 U.S. 831 19
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N.L.R.B. v. *Wells, Inc.*, 162 F. 2d 457 (C.A. 9) 15
N.L.R.B. v. *Westex Boot & Shoe Co.*, 190 F. 2d 12 (C.A. 5) ... 26
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Natonal Licorice Co. v. *N.L.R.B.*, 309 U.S. 350 .... 23, 25
Peoples Motor Express, Inc. v. *N.L.R.B.*, 165 F. 2d 903 (C.A. 4) 14
Phelps-Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177 20
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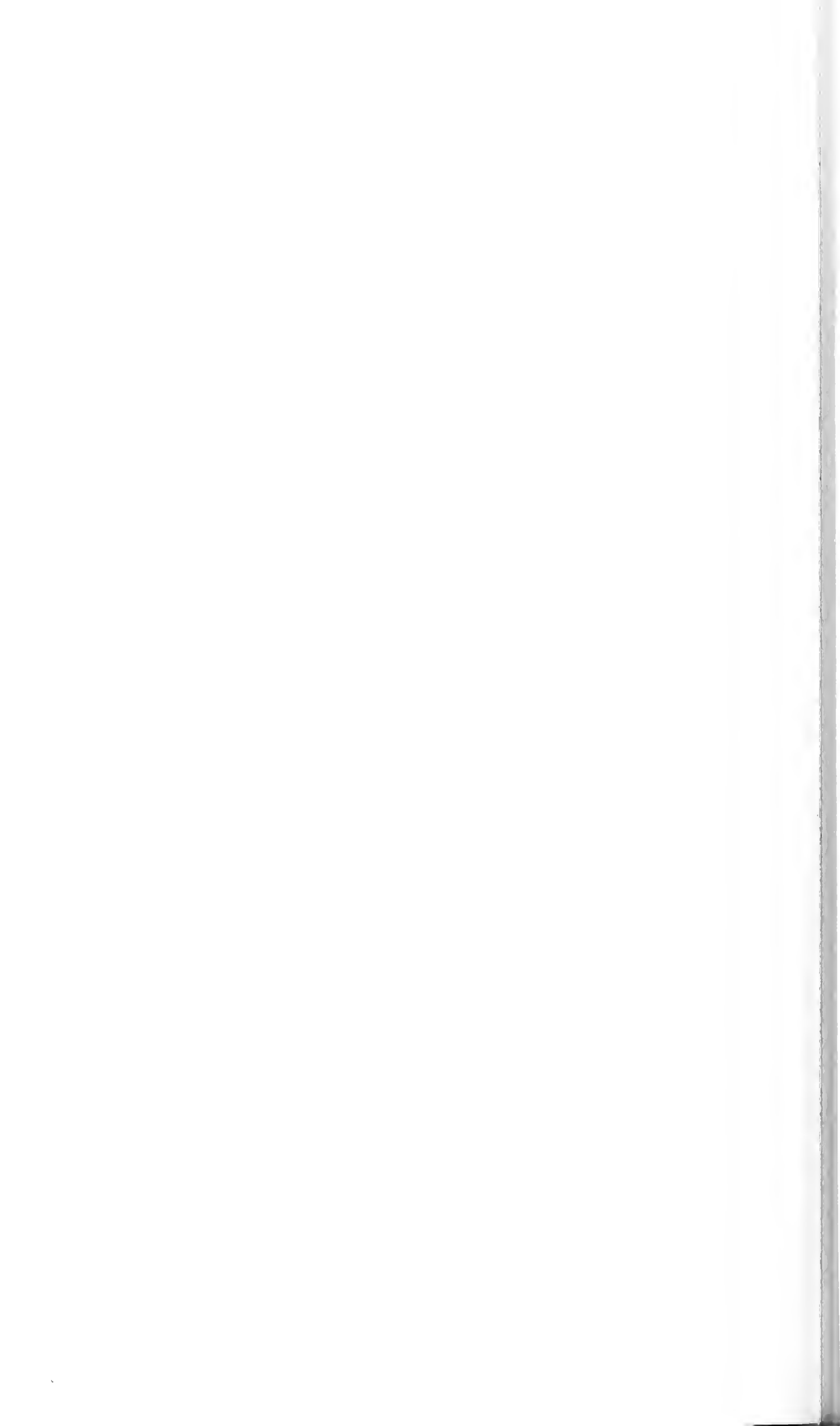
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53	21, 24
H. Rep. No. 245, 80th Cong., 1st Sess., p. 40	24
S. Rep. No. 105, 80th Cong., 1st Sess., p. 26	24
U. S. Department of Labor: *Glossary of Currently-Used Wage Terms*, 1949, p. 21	19



In the United States Court of Appeals for the Ninth Circuit

No. 13690

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for the enforcement of its order issued against respondents on September 11, 1952, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151, *et seq.*).[1] The Board's Decision and Order (R. 37-41) [2] are reported in 100 NLRB No. 162.

[1] The pertinent provisions of the Act are set forth in the Appendix *infra*, pp. 30-33.

[2] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

This Court has jurisdiction under Section 10 (e) of the Act, the unfair labor practices having occurred at respondent's plant at Whittier, County of Los Angeles, California, within this judicial circuit.[3]

STATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

The charging party in this case, International Union, United Automobile Workers, A.F.L. (hereinafter called the Union) attempted to organize respondent's employees in the last two or three months of 1950. On December 28 of that year, Employee Thomas Frederick, the Union's chief promoter in the plant, was discharged and the employment of a welder named Clarence Leeper was also terminated that same day. In agreement with the Trial Examiner, the Board found that respondent violated Section 8(a)(1) and (3) of the Act by discharging Frederick because of his activity on behalf of the Union and discharging Leeper because he led a group of employees in concerted activity protected by Section 7 of the Act. The subsidiary facts on which these findings are based are summarized below.

A. The discharge of Employee Frederick for engaging in Union activities

1. *Frederick's employment record*

Thomas Frederick worked steadily for respondent, except for two short economic layoffs, from 1946 until he was discharged on December 28, 1950 (R. 15; 87-89). When first hired, Frederick had just come out of the

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[3] Respondent partnership operates a job machine shop, employing about 125 workers (R. 23; 160). It manufactures combustion equipment, and admits that it is engaged in commerce under the Act (R. 13; 5, 7-8, 43).

Navy, where he had received some training in machine work (R. 192). Respondent took over his training, and for about a year he was assigned to machining axles (R. 16; 170, 192). His performance was considered "fairly satisfactory" (R. 193, 170), and Ed Gilly, the shop foreman, told Fred Nemec, one of the partners in the firm, that he was "a good man on axles" (R. 157). In 1950, Frederick arranged with respondent to work part-time only, averaging 30 hours a week, in order to attend school under the G. I. Bill (R. 15; 88-89, 100-101, 171). During this period, Frederick's work consisted chiefly of machining carbon inserts (R. 16; 170-171). This was an unpleasant, dirty task and Frederick protested being assigned to it so steadily (R. 16, 21; 94-95, 109, 182, 194-195). He had a special aptitude for making the carbon bores, however (R. 195), and was not relieved of the assignment until early December 1950. At that time Frederick was put on set-up and machine repairing, which was work he had done intermittently in the past; and a full-time employee was assigned to producing carbon bores, for which respondent's production requirements had then increased (R. 95, 97, 109, 172, 180-181, 206).

2. *Frederick is discharged immediately after soliciting for the Union*

In October 1950, Frederick became interested in the Union, which was then embarking on a campaign to organize the plant. He served as the Union's one-man organizing committee (R. 13-14; 51-53, 89-91, 97-98). On December 27 and 28 he brought 100 Union designation cards into the plant and, with the aid of one or two other employees, distributed them to his fellow workers

to be signed (R. 16; 55-56, 90, 102-103, 104). Cards signed by 55 employees, approximately half of respondent's work force, were returned to Frederick on the 28th (*ibid.*). He attempted to avoid observation while engaged in this solicitation campaign, but Foreman Gilly saw him handing out a card (R. 16, 21; 90-91, 104-105, 179). Realizing that Gilly had observed him, Frederick facetiously suggested to the foreman that he ought to sign a union card himself (R. 16; 90-91, 104-105, 120).

Shortly afterward Gilly brought Frederick his paycheck and discharged him, stating that Fred Nemec, one of the partners in the firm, had complained of his failure to keep his machines clean (R. 16, 17; 92, 106-107). Frederick said "You know that isn't right, Ed," and suggested that the discharge was due to his Union activity, to which Gilly replied, "All I know is what the old man told me" (R. 16; 93, 107, 178).[4]

On the following day, the Union filed a petition with the Board, seeking an election and certification as bargaining agent of respondent's employees (R. 49).[5] In discussions with the men during this period, respondent Martin explained that the Company could not afford to meet the Union's anticipated demands for higher wages (R. 23; 81-82, 85), and Nemec told one employee that he did not "see where the unions were going to do anybody any good in our shop" (R. 23; 168). For leading a group of welders in an attempt to obtain an increase

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[4] Prompted by respondent's counsel, Gilly testified at one point that in this interview he also referred to the sledgehammer and toolholder incidents, discussed below. The Trial Examiner did not credit this testimony, which was in conflict with Frederick's version of the conversation (R. 16, 22).

[5] A consent election was held on January 23, 1951. The Union lost the election but filed objections. The representation case was thereafter suspended without final ruling by the Regional Director, pending the outcome of this unfair labor practice case (R. 49-50).

in pay, respondent also discharged employe Clarence Leeper on December 28, as discussed below (pp. 8-12, 17-21).

3. *Respondent's subsequent explanation of Frederick's discharge*

In the proceedings before the Board, respondent contended that Frederick was discharged for careless workmanship, refusal to perform tasks assigned to him, and failure to obey instructions (R. 9). Respondent relied chiefly on Foreman Gilly's testimony to support these contentions for it was Gilly who was primarily responsible for the discharge. On December 28, the foreman recommended this action to Elwood Martin, one of the partners in the firm, and received permission to do as he saw fit (R. 17; 177, 196, 200-201). Contrary to what Gilly told Frederick in the discharge interview, Partner Fred Nemec, the "old man" (p. 4, *supra*) was not consulted (R. 20; 159).

In line with what Gilly told Frederick at the time of the discharge, the foreman and both partners, Martin and Nemec, testified that Frederick had failed, in the face of specific admonitions, to observe a plant rule requiring all employees to keep their machines clean (R. 157, 172, 173, 193). However, respondent's officials did not deny that this was a chronic fault of many of the employees (R. 108, 150, 173); and they admitted that Frederick had not been reprimanded for leaving a machine dirty since 1948 (R. 21; 182-183, 165-166). According to Gilly, the principal cause of the discharge was a series of incidents which took place in December 1950. As to these incidents he testified as follows:

(1) Early in December, the foreman said, Frederick threatened to quit unless he was taken off the carbon-

boring work, which he disliked.[6] Thereupon, as Partner Martin also testified, Gilly complained to Martin, stating that Frederick seemed to have lost interest in his job, and ought to be discharged or allowed to quit because he was not qualified for any other work but carbon machining. (R. 18; 172, 173-174, 184, 194, 199.) Martin, however, declared that it would be bad policy to discharge an employee just before Christmas, instructed the foreman to find something for Frederick to do, and said to "keep him on until after the first of the year [to] * * * see how things would work out" (R. 16; 172, 184, 199).

(2) After Frederick was assigned to set-up and machine repair work, according to Gilly, he disobeyed instructions while working with another employee on the assembly of a Potter & Johnston machine. The foreman allegedly observed the two employees using a sledge hammer to force a drum into place, told them not to use the hammer, and then, when he caught them using it again a few minutes later, admonished them to "at least use a block of wood [to take the force of the blows] if they wanted to hammer on it" (R. 174-175). Gilly claimed that this incident occurred on December 27, and stated that he reported it to Partner Martin on the 28th when he sought permission to discharge Frederick; but Martin's testimony showed that it was actually a week before, about December 20 or 21, that Gilly told him about Frederick using a sledge hammer (R. 17; 174, 184, 199-200, 208).[7]

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[6] Frederick admitted that he grumbled about this assignment, but denied that he refused to perform the work, or threatened to quit (R. 108-109).

[7] Frederick recalled working on a Potter & Johnson machine at that time, but did not remember using a sledge hammer (R. 98, 112).

(3) Finally, Gilly testified, Frederick disregarded his instructions as to the method of performing a machine set-up task to which he was assigned on December 28; a toolholder on the machine broke as the result of the employee's carelessness; and this was the episode which immediately precipitated the discharge (R. 17; 176-177). Frederick, who denied that he had ever refused to follow instructions in his work (R. 99), admitted that the toolholder had broken when he was working on this machine, but pointed out that it was a very old machine which had been broken before in the same spot (R. 109-110). Gilly, although insisting that Frederick was at fault, admitted these mitigating circumstances (R. 187, 189).

Gilly conceded in his testimony that Frederick may have spoken to him about signing a Union card on December 28 (R. 21; 179, cf. p. 4, *supra*), but nevertheless denied, as did Nemec and Martin, that he was aware of Frederick's connection with the Union until after the discharge (R. 158-159, 178, 201). The Trial Examiner specifically discredited this testimony, stating, among other things, that Gilly did not impress him as a reliable witness, and that Frederick's activity in circulating Union cards was too extensive to have escaped observation in this small plant (R. 20, 23).

4. *The Board's Conclusions as to Frederick's discharge*

Upon consideration of all the foregoing evidence, the Board found that respondent discharged Frederick because of his organizational activity on behalf of the Union, thereby violating Section 8 (a) (3) and (1) of the Act. In full agreement with the Trial Examiner, the Board found that the single cause—failure to clean

machines—stated to Frederick at the time of the discharge was an "ancient complaint," resurrected as a mere pretext to justify the summary dismissal (R. 22). And, for the reasons analyzed in the Argument, *infra* (pp. 14-16), the Board rejected respondent's other explanations of the discharge, based on Frederick's alleged offenses during the last month of his employment, which were advanced for the first time in answer to the complaint in this case.

B. The discharge of Employee Leeper for engaging in concerted activities

1. *Leeper speaks for his fellow employees in the welding shop, demanding correction of certain grievances*

Clarence Leeper, a welder of 22 years' experience, worked for respondent from October until December 28, 1950, when he was discharged. He died 6 months later, before the date of the Board hearing in this case (R. 12, 20; 124).

On December 27, 1950, Leeper was working on the night shift, which began at 5 p.m. and ended at about 5 a.m. (R. 64). That night, 15 employees, all the men working in the shop on that shift, gathered in one of the welding booths (R. 57-58). They brought in Night Superintendent Milliron and spoke to him about securing a night bonus and a paid lunch period (R. 14; 58). At their request, Milliron fetched Copartner Nemec. He told Nemec that "there was a work stoppage in the welding shop and Mr. Leeper had all the welders in an uproar" (R. 14; 152). When Nemec arrived on the scene, Leeper, speaking on behalf of his fellow employees (R. 60, 69, 148), told him that the men wanted a

night shift bonus and pay for their lunch period, and had been unable to get any satisfaction from Foreman Gilly and Copartner Martin, to whom they had previously spoken (R. 14; 70). Leeper said: "We want a showdown on this lunch hour pay . . . If we don't get it, we are going to walk out" (R. 14; 153). One of the other welders dissociated himself from this suggestion (*ibid*). Nemec, claiming not to be well acquainted with the problem, replied that he could not overrule the decisions of Gilly and Martin, but would check into the situation to see whether any commitments had been made (R. 60, 70, 145, 153). Leeper then stated that if the employees' demands were not granted, he was "quitting" (R. 14; 60, 70, 153). Thereupon another employee intervened, saying "I hope you don't mind if we don't strike along with you"[8] (R. 153). A third employee, however, announced that "[s]o far as I am concerned, you can give me mine now" (R. 14; 60-61, 152), whereupon Nemec told him "Well just go on to the office. We don't want any hot-headed characters around here" (R. 60-61). The conversation concluded with Leeper giving Nemec 24 hours in which to reach a decision (R. 14-15; 154).

After Nemec left the department, Leeper said to Welder Grimm: "When we check in . . . [W]e will come in at 4:30 and get our hoods and march out in front of the machine shop so they can see us" (R. 146).

The meeting over, Leeper went back to work and continued at his job for the remainder of the shift (R. 15; 146-147, 61). When he left the plant, he did not, as was the customary procedure for employees leaving

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[8] This phrase was incorrectly quoted in the Intermediate Report as "string along" (R. 14).

permanently, take his tools home with him (R. 20; 66, 126-127).

2. *Respondent's refusal to let Leeper come to work after the welding-shop incident*

On the afternoon following the incident in the welding shop, December 28, Leeper left home at the usual time before 4 p.m., taking his lunch along (R. 15; 126).

Around 4 o'clock that afternoon, when Leeper had already left for the plant, Nemec came to his house (R. 15; 125-126, 155), and inquired whether he was at home. Mrs. Leeper, who had never seen Nemec before (R. 137), replied, "No, he has gone to work" (R. 125). Nemec said he wanted to see Leeper and handed her Leeper's paycheck to date (R. 126). He told Mrs. Leeper that her husband had quit, at which she expressed surprise. She wanted to know what was the matter, and Nemec said "Well, he has given us an ultimatum of several things he wants and we can't meet his demands. Therefore we are letting him quit" (R. 155-156). He also stated that Leeper was one of the best welders the firm had ever had, that he had intended to make him a foreman (R. 126), and "hated to see him go" (R. 155). But, he maintained, Leeper had gotten the welding shop in an uproar and "we couldn't be pushed around like that . . . Due to the trouble he had stirred up in the welding shop, we couldn't put him back" (R. 155, 163-164). Nemec then left, taking back Leeper's paycheck (R. 126, 130-131).

In the meantime, Leeper had returned to the plant, but apparently was not allowed to work that day (R. 15; 61). He did not see Nemec on the 28th (R. 156). In the next few days, he made several more attempts to get

back on the job. He telephoned the plant to find out why he was not permitted to work (R. 15; 128-129), and he also had an interview with Nemec, offering to waive his demand for retroactive pay (R. 15; 127-128, 162-163). Nemec refused, however, to take him back because "things had gone as far as they had. There was so much trouble stirred up it just wouldn't be right" (R. 163). On this occasion Nemec acceded to Leeper's request for 4 hours call-in pay for December 28, the day following the meeting in the welding shop (R. 20; 132-133, 159-160).

The shift bonus and paid lunch period, for which Leeper had fought, were subsequently granted to the employees (R. 61-62).

3. *The Board's conclusions as to Leeper*

Rejecting respondent's claim that Leeper had voluntarily terminated his employment by quitting, the Board found that respondent discharged the employee because of the leading part he played in the welding shop incident, and that, since this incident constituted concerted activity protected by Section 7 of the Act, the discharge was an unfair labor practice forbidden by Section 8 (a) (1) of the Act (R. 18-20).

Following its reasoning in an earlier case,[9] the Board also held that respondent's treatment of Leeper discouraged membership in labor organizations and accordingly violated Section 8(a)(3) of the Act as well as Section 8(a)(1), (*ibid*) because: (1) the group of employees who joined with Leeper in seeking improvement in their wages and working conditions constituted a labor organization under Section 2(5) of the Act;

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[9] *Smith Victory Corporation*, 90 NLRB 2089, 2101, 2104, affirmed 190 F. 2d 56 (C.A. 2).

and (2) to discourage employees from resorting to "concerted" activity for the purpose of "mutual" aid (Section 7) normally tends to discourage them from joining and supporting labor organizations, the customary instrument of such movements.

SUMMARY OF ARGUMENT

1. The Board properly determined that Frederick and Leeper were victims of unlawful discrimination:—

a. Substantial evidence supports the Board's finding that Frederick's activity in behalf of the Union was the motivating cause of his discharge. Accordingly, the discharge constituted a violation of Section 8 (a) (3) and (1) of the Act.

b. The undisputed facts show that respondent denied employment to Leeper because he acted as leader and spokesman of the group of employees who stopped work in the welding shop for the purpose of presenting a concerted demand for higher pay. Since this was concerted activity "for the purpose of * * * mutual aid" protected by Section 7 of the Act, respondent's discriminatory reprisal against Leeper plainly violates Section 8 (a) (1) of the Act, if not Section 8 (a) (3) as well. On the record, the Board was fully warranted in rejecting respondent's contention that Leeper resigned his job voluntarily. Moreover, even if it can be said that Leeper "quit," respondent undeniably anticipated his immediate application for reemployment and refused to take him back because of his leadership in the protected activity of the welding-shop employees. Either way, the decisive act in terminating Leeper's employment was respondent's and it was an unfair labor practice.

2. There is no merit in respondent's contention that the complaint herein was barred by the 6-months limitation contained in Section 10 (b) of the Act. The charge was timely filed, and it refers with adequate particularity to the discriminatory discharges of Frederick and Leeper, the only unfair labor practices alleged in the complaint which were found to have been committed in this case.

ARGUMENT

I. The Board Properly Determined That Respondent Discriminated Against Employees Frederick and Leeper, in Violation of Section 8 (a) (1) and (3) of the Act

A. *Substantial evidence supports the Board's finding that Frederick was discharged because of his activity in behalf of the Union*

As we have seen (pp. 2-5, *supra*) Thomas Frederick, who had worked for respondent for 6 years, was summarily discharged on December 28, 1950, immediately after Foreman Gilly saw him passing out union cards in the plant. That day and the day before, Frederick had been responsible for distributing 100 of these cards among respondent's 125 employees; and the Board was clearly entitled to infer, as it did, that his leading role in the Union's organizing campaign had by this time come to the notice of respondent's officials (pp. 3-4, *supra*).[10] The firm admittedly did not relish the prospect of having to deal with its employees through a collective bargaining agent and, on the same day that Foreman Gilly fired Frederick, another employee, Leeper, was discharged by Partner Nemec because he acted as spokesman for the welders on the

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[10] *N.L.R.B.* v. *Weyerhaeuser Timber Co.*, 132 F. 2d 234, 236 (C.A. 9); and see *Angwell Curtain Co. Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).

night shift in their concerted attempt to obtain concessions from respondent relating to their wages and working conditions (pp. 4-5, *supra* and pp. 17-21, *infra*). At the time of Frederick's discharge, nothing was said about the alleged negligence or inefficiency on which respondent later relied to explain its action (*supra*, pp. 5-7). These circumstances, we submit, justify the Board's inference that Frederick's union activity was the operative cause of his abrupt discharge.[11] He was not a model workman (cf. R. 21), but "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *Wells, Inc.* v. *N.L.R.B.*, 162 F. 2d 457, 460 (C.A. 9).

In this case, the inference that union activity was "the moving cause" is strengthened by the fact that respondent's attempted explanation of Frederick's discharge does not "stand up under scrutiny." *N.L.R.B.* v. *Abbott Worsted Mills,* 127 F. 2d 438, 440 (C.A. 1), quoted with approval in *N.L.R.B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 595 (C.A. 9); see also *N.L.R.B.* v. *Weyerhaeuser Timber Co.,* 132 F. 2d 234, 236 (C.A. 9); *N.L.R.B.* v. *Bird Machine Co.,* 161 F. 2d 589, 592 (C.A. 1). The explanation given Frederick by Foreman Gilly in the final interview was obviously not true; contrary to what Gilly implied, Partner Nemec had not been consulted about the discharge (*supra*, p. 5) and if Frederick's alleged laxity about cleaning his machines—the only specific fault Gilly mentioned at that time [12]—had

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[11] See *N.L.R.B.* v. *Dinion Coil Co.*, 201 F. 2d 484, 487 (C.A. 2); *N.L.R.B.* v. *Smith Victory Corp.*, 190 F. 2d 56, 57-58 (C.A. 2); *Peoples Motor Express Co.* v. *N.L.R.B.*, 165 F. 2d 903, 904 (C.A. 4); *Magnolia Petroleum Co.* v. *N.L.R.B.*, 200 F. 2d 148, 149-150 (C.A. 5); and cases cited *infra*, p. 15.

[12] As noted above (p. 4, note 4, *supra*), the Trial Examiner did not credit Gilly's testimony that he mentioned other, and more recent

been a matter of particular concern to respondent since 1948, no one had told Frederick about it (p. 5, *supra*). Compare *N.L.R.B.* v. *State Center Warehouse, etc.*, 193 F. 2d 156, 158 (C.A. 9).

In the proceedings before the Board a year later, [13] Foreman Gilly cited several other grounds of complaint against Frederick, all arising during the last month of the employee's tenure (*supra*, pp. 5-7). But the foreman was not a reliable witness, in the Trial Examiner's judgment, and even if his story of Frederick's allegedly objectionable behavior is believed, it still does not account for respondent's contemporaneous treatment of the employee. If Gilly, as he professed, was exasperated to the breaking point by the toolholder incident (*supra*, p. 7), it becomes inexplicable that when he paid Frederick off he did not mention that alleged offense, which occurred only a few hours before the discharge. Instead he resuscitated the stale complaint that Frederick had failed to clean his machines properly. "Such action on the part of an employer is not natural." *E. Anthony & Sons* v. *N.L.R.B.*, 163 F. 2d 22, 26 (C.A.D.C.), certiorari denied, 332 U.S. 773. Similarly, Gilly's own account of the sledgehammer episode (*supra*, p. 6) strongly suggests that, in retrospect, he imagined or exaggerated the element of insubordination which was supposedly involved. At the time of that incident, which occurred a week before the discharge, he did not scold Frederick and his fellow-

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misdemeanors. "For obvious reasons, questions of credibility were for the examiner." *N.L.R.B.* v. *State Center Warehouse, etc.*, 193 F. 2d 156, 157 (C.A. 9).

[13] In weighing the evidence as to the motivation for a discharge, the Board may properly discount "palpable afterthought[s]." *N.L.R.B.* v. *Wells, Inc.*, 162 F. 2d 457, 459 (C.A. 9); and see *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347.

worker for their alleged disobedience of his order to stop using the sledgehammer. He only told them to modify their procedure if they chose to continue using the hammer; and this, too, was something he failed to mention when he discharged Frederick.

Finally, as the Board observed, respondent's claim that Frederick had been tentatively slated for discharge since early December is not believable (*supra,* pp. 5-6), cf. R. 21). It was then, according to Martin and Gilly, that they became annoyed with the employee for allegedly threatening to quit unless he were relieved of the carbon-boring job, and at the same time concluded that he was both disinterested in his job and unqualified for work other than carbon boring. Yet, these officials did not take advantage of the opportunity, which Frederick himself had allegedly created for them, to get rid of a man who was said to be disgruntled, and incompetent as well. Instead, they kept him on and gave him other work to do. Their testimony that Frederick, from that time on, was only on trial until "after the first of the year" (*supra,* p. 6) hardly squares with their failure to warn him that he must mend his ways, or with their sudden decision to discharge him a few days *before* New Year's.

All these things considered, it is patent that respondent had some compelling reason for the summary discharge which its officials did not see fit to disclose to Frederick at the time. And, we submit, the Board's finding that the hidden cause was, in fact, the employee's union activity constitutes a reasonable "choice between two * * * conflicting views." *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474, 488; *N.L.R.B.* v. *Howell Chevrolet Company,* F. 2d (C.A. 9), 31 LRRM 2462 (decided Feb. 26, 1953) and cases there

cited. It goes without saying that a discharge so motivated violates Section 8 (a) (3) and (1) of the Act.

B. *Respondent excluded Clarence Leeper from his job because he engaged in concerted activity protected by Section 7 of the Act*

The only disputed question of fact in Clarence Leeper's case is whether he was discharged, as the Board found, or quit his job, as respondent contends. Either way, respondent seems to concede, Leeper's separation from the payroll on December 28 resulted directly from the welding shop incident which took place the night before, in which the employee acted as spokesman for his fellow workers in presenting a common grievance to management (*supra*, pp. 8-10). And this incident, as respondent also appears to concede, was undoubtedly an episode of "concerted activit[y] for the purpose of * * * mutual aid or protection" (Section 7) for which the participants could not lawfully be discharged. *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C.A. 9) and cases there cited; *N.L. R.B.* v. *Tovrea Packing Co.*, 111 F. 2d 626, 629 (C.A. 9) certiorari denied 311 U.S. 668; *N.L.R.B.* v. *J. I. Case Co.*, 198 F. 2d 919, 922 (C.A. 8), certiorari denied, 345 U.S. 917.[14]

The Board's finding that Leeper did not quit, but was

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[14] The fact, emphasized by respondent in its exceptions before the Board (R. 32), that Leeper was not a Union man and did not act for the Union in instigating the collective activity in the welding shop may be relevant to the question whether respondent violated Section 8(a) (3) of the Act, as well as 8(a)(1), in discharging him—as to which, see discussion at pp. 20-21 *infra*, and note 18. But under Section 7 and 8(a)(1) of the Act, the employees were clearly protected in staging a brief work stoppage to reinforce their demand for higher pay, notwithstanding that they acted spontaneously and without the backing of the Union. *Globe Wireless* and other cases cited *supra*.

discharged because he created an "uproar" by instigating the welders' work stoppage is fully supported by the evidence. Co-partner Nemec's own account of the colloquy in the welding shop on the evening of December 27 (*supra*, p. 9) shows that Leeper certainly did not resign then and there; he only threatened to "quit" —and in the context, obviously meant "strike"—unless respondent agreed to redress the welders' grievances within 24 hours. When Leeper left the plant the next morning, after working out the shift, he did not take his tools, as an employee who had quit would normally have done (*supra*, pp. 9-10). And on the afternoon of the 28th he returned to the plant at the usual time (*supra*, p. 10). Since he died before the hearing, there is no competent direct evidence as to whether he then had anything in mind except to go to work as usual. But the absence of such evidence is unimportant, for respondent did not wait to see whether Leeper would quit, or make good his threat to lead the welders out on strike, or reconsider his 24-hour "ultimatum".

Assuming the initiative at that point, Nemec went to Leeper's house about an hour before shift time, taking the employee's paycheck with him. In his conversation with Mrs. Leeper, although claiming that the husband had "quit," Nemec made it clear that Leeper was now *persona non grata* at the plant, "due to the trouble he had stirred up in the welding shop." Accordingly, he added, the employee "couldn't [be] put back" to work (p. 10, *supra*). A day or two later, Nemec admittedly said the same thing to Leeper himself when the employee applied to him for reinstatement (p. 11, *supra*). At the same time, he awarded Leeper the "call-in" pay

he demanded for the afternoon of the 28th,[15] an action which does not square with his asserted belief that Leeper had voluntarily abandoned his job 12 hours before going to the plant that afternoon.[16]

In sum, Nemec's own contemporaneous actions and statements, far from bearing out the contention that Leeper quit his job, provide cogent support for the Board's finding that the employee was, in fact, discharged. A case in point here is *N.L.R.B.* v. *Stowe Spinning Co.*, 165 F. 2d 609, 615 (C.A. 4), certiorari denied 344 U.S. 831 where the court, commenting upon a factual situation which strongly resembles Leeper's case, said

> The question [is] whether Hall was discharged for union activities, as the Board found, or resigned rather than do the work required of him * * * He was an active union organizer, and there is some evidence that his conduct in this respect was known to his employer. He was an unusually good worker and the alacrity with which the overseer seized upon his statement that he was quitting, and the subsequent refusal of the superintendent to grant his request for reinstatement, tend to show that the company's position was actuated by something other than his conduct on his last day at the plant [i.e., declaring, in a moment of anger, that he would quit rather than do the work the overseer required].

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[15] "Call-in" or "reporting" pay is "the amount of pay guaranteed to a worker who reports for work at the usual hour, without notification to the contrary, and finds no work available * * *". U.S. Department of Labor: *Glossary of Currently-Used Wage Terms,* 1949, p. 21.

[16] Nemec's implausible explanation that Leeper was given the 4 hours call-in pay because he complained of respondent's failure to have his final check ready for him at 4:00 a.m. that morning was specifically discredited by the Trial Examiner (R. 20).

So here, even if respondent placed a literal interpretation upon Leeper's statement that he would quit unless something was done about the welders' pay, Partner Nemec "seized upon" that statement with "alacrity" and used it as the pretext for his subsequent refusal to let the employee go back to his job. And here, even more plainly than in the *Stowe* case, it is evident—indeed, admitted—that respondent's decision to exclude the employee from his position was "actuated" by its resentment of the leading role he had played in the welders' concerted demand for an increase in pay. By denying Leeper employment for this reason,[17] respondent manifestly infringed its employees' statutory right to act together for "mutual aid and protection" (Sec. 7), and violated Section 8(a)(1) of the Act. See *N.L.R.B.* v. *John H. Barr Marketing,* No. 13465, this term, per curiam opinion, June 2, 1953, enforcing 96 NLRB 875; and cases cited at p. 17, *supra*. Moreover, since the employees at the plant were then in the midst of a Union organizational campaign which was bound to be affected by any manifestation of respondent's hostility to concerted activity protected by the Act, and since the welders who acted under Leeper's leadership constituted an *ad hoc* "labor organization" (Act, Sec. 2(5)), the Board's determination that respondent's treatment of Leeper likewise discouraged membership in a labor

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[17] As we have shown, the record fairly establishes that Leeper's loss of employment was actually the result of a discharge, not a resignation. But even if he did quit his job an the night of the 27th or the morning of the 28th, respondent anticipated his immediate application for reemployment and refused to take him back for the stated reason that he had "stirred up trouble" in the welding shop (pp. 10-11 *supra*). Under the rule of *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, this was an unfair labor practice, regardless whether it be deemed a discharge or a refusal to hire an applicant for employment. See also *N.L.R.B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 593, note 6 (C.A. 9).

organization, in violation of Section 8(a)(3) of the Act, is also entitled to stand.[18]

II. The Board Properly Overruled Respondent's Objections to the Complaint, Based on the Six-month Limitation Proviso in Section 10 (b) of the Act

Section 10 (b) of the Act (*infra*, p. 31) authorizes the Board to issue a complaint "whenever it is charged" that any person has committed an unfair labor practice. A proviso to this Section, added by the Taft-Hartley Act, states that

> no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

The Union's charge in the present case was filed on February 1, 1951. This was within the six-month limitation period, since the unfair labor practices which gave rise to the proceeding occurred on December 28, 1950. Respondent contends, however, that the complaint, which was issued on November 14, 1951,[19] was barred by the proviso insofar as its allegations respecting the Frederick-Leeper discharges are concerned. This contention refers to certain differences between

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[18] *Tovrea Packing Co.*, 12 NLRB 1063, 1070, enf'd 111 F. 2d 626, 629 (C.A. 9), certiorari denied 311 U.S. 668; *N.L.R.B.* v. *Kennametal, Inc.*, 182 F. 2d 817, 818 (C.A. 3); and see *N.L.R.B.* v. *J. G. Boswell Co., supra*, 136 F. 2d at 595-596; but cf. *Gullett Gin Co.* v. *N.L.R.B.*, 179 F. 2d 499, 502 (C.A. 5); *Modern Motors, Inc.* v. *N.L.R.B.*, 198 F. 2d 925, 926 (C.A. 8)

Even if Leeper's discharge be regarded as a violation of Section 8(a)(1) alone, and not Section 8(a)(3) as well, the remedy is the same. See *N.L.R.B.* v. *J. I. Case, supra*, 198 F. 2d at 922-923, 924; *N.L.R.B.* v. *Nu-Car Carriers*, 189 F. 2d 756, 760 (C.A. 3), certiorari denied 342 U.S. 919; *Gullett Gin case, supra, loc. cit.*

[19] The Act contains no limitation as to the time when a complaint may be issued. Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53.

the descriptive language of the complaint and the corresponding averments of the underlying charge. The complaint stated that the two employees were discharged

> for the reason that they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection (R. 5-6);

whereas the charge recited that Frederick and Leeper were discharged

> upon the grounds that these employes were engaging in union organizational activities * * * (R. 2).

Both charge and complaint alleged that respondent violated Section 8 (a) (1) of the Act as well as Section 8 (a) (3) by discharging the two employees;[20] and both identified the transactions complained of by giving the names of the individuals and the date of their dismissals. The only difference is that the detailed averment in the complaint is broad enough to describe, not only a discharge for "union" activity (which fits Frederick's case exactly),[21] but also a discharge for "concerted"

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[20] An additional allegation in both charge and complaint (R. 2, 6), to the effect that respondent also violated Section 8 (a) (1) by attempting to influence employees to reject the Union at or about the time of the Board election in January 1951 (misstated 1950 in the charge and complaint) was dismissed by the Trial Examiner at the hearing (R. 137-138, 140). Since the Examiner ruled that he would not dismiss the Section 8 (a) (1) allegations of the complaint as to the discharges of Frederick and Leeper (R. 140, cf. R. 12), there is no basis for respondent's contention (Exceptions 1 and 6, R. 31-32, 33) that the Board's discrimination findings are founded on allegations which were dismissed.

[21] "Union" activity, of course, is a form of "concerted activities * * * for the purpose of collective bargaining and other mutual aid and protection." Accordingly, respondent's contention that the language of the complaint does not support the Board's finding that

activity *not* undertaken in behalf of a union (which fits Leeper's case exactly), whereas the charge refers specifically to "union" activity alone. Despite this variance the charge manifestly served, as well as the complaint, to put respondent "on notice that the [two named] employee[s] challenge[d] its basis for dismissing [them]" (*N.L.R.B.* v. *Kingston Cake Co.*, 191 F. 2d 563, 567 (C.A. 3)). Yet respondent argues that the Board was "without jurisdiction" (R. 32, 33) to proceed in this case because the complaint departed from the charge so radically as to state "new and additional" (R. 32) or "new and different" (R. 33) unfair labor practices, not included in any timely charge. This position, we maintain, is completely untenable.

Except for insertion of the proviso on which respondent relies, the provisions of Section 10 (b) relating to charges and complaints were reenacted without change in 1947. And under the Wagner Act it was generally recognized that the permissible scope of a Board complaint was not limited by the averments of the underlying charge. See *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 225; *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 367-369; *Consumers Power Co.* v. *N.L.R.B.*, 113 F. 2d 38, 42-43 (C.A. 6); *N.L.R.B.* v. *American Creosoting Co.*, 139 F. 2d 193, 195 (C.A. 6), certiorari denied 321 U.S. 797; *Fort Wayne Corrugated Paper Co.* v. *N.L.R.B.*, 111 F. 2d 869, 873 (C.A. 7); *Killefer Mfg. Corp.*, 22 NLRB 484, 488. The basic reason for this rule was indicated by the Supreme Court's comment in *N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 18: "The charge * * * merely sets in

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Frederick was discharged for "union" activity (Excep. 5, R. 33) appears to be frivolous.

motion the machinery of an inquiry. * * * [It] does not even serve the purpose of a pleading."

The proviso which was added to Section 10 (b) in 1947 does not convert the charge into a pleading. This amendment, as the Board explained in *Cathey Lumber Company,* 86 NLRB 157, 158-163 (1949), affirmed 185 F. 2d 1021 (C.A. 5)[22] only serves the purpose of a statute of limitations which extinguishes liability for "any" unfair labor practices committed by the party respondent more than 6 months before the filing and service of "the" charge initiating the case.[23] But it is still true since the enactment of the Taft -Hartley Act, as before, that "The Act contains no specification of what constitutes a proper charge, save that it shall state that the respondent has engaged, or is engaging in any unfair labor practices affecting commerce. * * * We must keep in mind that the statutory powers of the Board include not only the conduct of hearings and the entry of cease and desist orders, but [also] preliminary investigatory authority necessary to * * * the formulation and issue of a complaint," *Consumers Power Co.* v. *N.L.R.B.*, 113 F. 2d 38, 42 (C.A. 6). Nothing in the language or legislative history of the Section 10(b) proviso suggests that its purpose is to curtail this "investigatory authority," now vested in the General Counsel. Yet the scope of the preliminary investigation, and even the General Counsel's choice of legal issues to be framed

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[22] Vacated on other grounds, 189 F. 2d 428, but reaffirmed on this point in *Stokely Foods, Inc.* v. *N.L.R.B.*, 193 F. 2d 736, 737-738 (C.A. 5).

[23] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 53; S. Rep. No. 105, 80th Cong., 1st Sess., p. 26; H. Rep. No. 245, 80th Cong., 1st Sess., p. 40; also *N.L.R.B.* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506 (C.A. 5), where the court said, "We agree * * * that the statute is a statute of limitations, and not one of jurisdiction * * *."

and tried in a given case is necessarily restricted if the charge fixes the permissible limits of the complaint, as respondent in the present case assumes it must do.[24] Indeed, a Board proceeding under Section 10 of the Act would be converted into a species of private lawsuit, under the construction of the proviso which respondent advocates, for the initial responsibility of framing the legal issues in the case, as well as the burden of discovering all the essential facts, would be shifted from the General Counsel to the private party who happens to file the charge.[25] This would be a drastic departure from the fundamental statutory concept that the Board, once its jurisdiction is invoked, proceeds, not in vindication of private rights, but as an administrative agency charged by Congress with the function of bringing about compliance with the Act's provisions. See *National Licorice Co.* v. *N. L. R. B.,* 309 U.S. 350, 362 and authorities there cited; also *Medo Photo Corp.* v. *N.L.R.B.,* 321 U.S. 678, 687.

The foregoing considerations have prompted a majority of the Circuit Courts to hold, in agreement with the Board, that a complaint under the amended Act may properly deviate from the charge, provided only that the violations included in the complaint did not occur prior to the 6-months' period of limitation fixed by the filing and service of the charge. As held by the Third

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[24] The Board's power to amend the complaint "in its discretion at any time prior to the issuance of an order based thereon * * *" (Section 10(b)) would also appear to be aborted under this view. Cf. *N.L.R.B.* v. *Kanmak Mills, Inc.,* 200 F. 2d 542, 544-545 (C.A. 3).

[25] As the Court of Appeals for the 10th Circuit observed in *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415, "Anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading."

Circuit in *N.L.R.B.* v. *Kingston Cake Company, Inc.,* 191 F. 2d 563, 567

> The purpose of the charge is not to define the issues to be tried with the precision that is sought normally in pleadings in law suits. * * * it would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegation.

See also *Cusano* v. *N.L.R.B.,* 190 F. 2d 898, 903-904 (C.A. 3). And the Second Circuit, justifying the same result in terms of a liberal "relation back" doctrine, stated in *N.L.R.B.* v. *Gaynor News Company, Inc.,* 197 F. 2d 719, 721, certiorari granted, 345 U.S. 902

> This Section [10 (b), as amended] has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period—which "relate back" or "define more precisely" the charges enumerated within the original and timely charge. The "relating back" doctrine for this purpose has been liberally construed to give the Board *wide leeway for prosecuting offenses unearthed by its investigatory machinery,* set in motion by the original charge (italics added.)

See also *N.L.R.B.* v. *Dinion Coil Co.,* 201 F. 2d 484, 491 (C.A. 2). Similar views have been expressed by the First, Fifth, Seventh, and Tenth Circuits: *N.L.R.B.* v. *Kobritz,* 193 F. 2d 8, 14-16 (C.A. 1); *N.L.R.B.* v. *Cathey Lumber Co.,* 185 F. 2d 1021 (C.A. 5) (see footnote 22, p. 23, *supra*); *Stokely Foods, Inc.* v. *N.L.R.B.,* 193 F. 2d 736, 737-738 (C.A. 5); *N.L.R.B.* v. *Westex Boot & Shoe Co.,* 190 F. 2d 12, 13 (C.A. 5); *N.L.R.B.* v.

Bradley Washfountain Co., 192 F. 2d 144, 149 (C.A. 7); *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 415 (C.A. 10). This Court, too, although it has yet to decide a case in which the complaint or an amended charge filed after the 6-months' limitation period embraced a violation omitted from the timely charge,[26] has held that there is no objection to a complaint which describes with particularity violations which were stated "in only the most general terms" in the charge. *Katz et al.* v. *N.L.R.B.*, 196 F. 2d 411, 415 (C.A. 9), citing with approval the *Cusano, Westex,* and *Kansas Milling* cases, *supra.*

The foregoing decisions support the result reached by the Board in the present case. Insofar as the complaint herein can be said to depart from the charge, it only indicates a slightly changed *reason* for the claim—advanced in the timely charge as well as the complaint itself—that the discharges of both Frederick and Leeper violated both Section 8 (a) (1) and (3) of the Act. A similar variance in the description of "the identical fact situation—the discharge of [the same employee]," was termed "at most, a slight change in legal theory" and held to be inconsequential in the *Cusano* case, *supra* (190 F. 2d at 903 (C.A. 3)). And in the *Westex* case, *supra,* the Fifth Circuit upheld a complaint which departed from the underlying charge, exactly like the complaint in this case, by stating that certain employes were discharged for "concerted" activity rather than "union" activity (190 F. 2d at 13). The contrary opinion of the Fourth Circuit in an earlier case, *Joanna Cotton Mills* v. *N.L.R.B.*, 176 F. 2d

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[26] Cf. *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (C.A. 9).

749, 754, was rejected *sub silentio* by the Third and Fifth Circuits in *Cusano* and *Westex;* it adopts a hyper-technical approach to the charge which conflicts with the cases cited *supra*, pp. 23-25; and it has not been followed by other Circuits in any of the comparable cases arising under the amended Act (*supra*, pp. 26-27).[27] For these reasons, the Board respectfully submits that the *Joanna* opinion misconstrues the requirements of Section 10 (b), and that it should not be followed by this Court.

To recapitulate, we contend that the Board properly held that the charge provides an adequate foundation for the complaint in the case at bar since the charge was seasonably filed and served, and it describes in both general and specific terms unfair labor practices which are, to say the very least, closely related to the violations alleged in the complaint and proved by the evidence.

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[27] In *Joanna*, as here, the timely charge stated that an employee had been discharged for "union" activity, whereas the complaint alleged, and the Board found, that the reason for the discharge was the employee's participation in "concerted" activity. The court expressed the opinion that this was a fatal variance because the complaint introduced "a new and entirely different charge of unfair labor practice from that contained in the original charge." This ruling, however, was not essential to the court's decision, for it first considered the merits of the case and held, reversing the Board, that the "concerted" activity for which the employee was discharged was not protected by the Act, hence the discharge was not an unfair labor practice in any event.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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JUNE, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 151, *et seq.*), are as follows:

Definitions

Sec. 2. When used in this Act—

*   *   *   *   *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

*   *   *   *   *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon the preponderance of the

testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in

whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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No. 13690.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

National Labor Relations Board,

Petitioner,

vs.

Elwood C. Martin, Fred R. Nemec, and Robert W. Nemec, a Co-partnership d/b/a Nemec Combustion Engineers,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

FILED

JUL 28 1953

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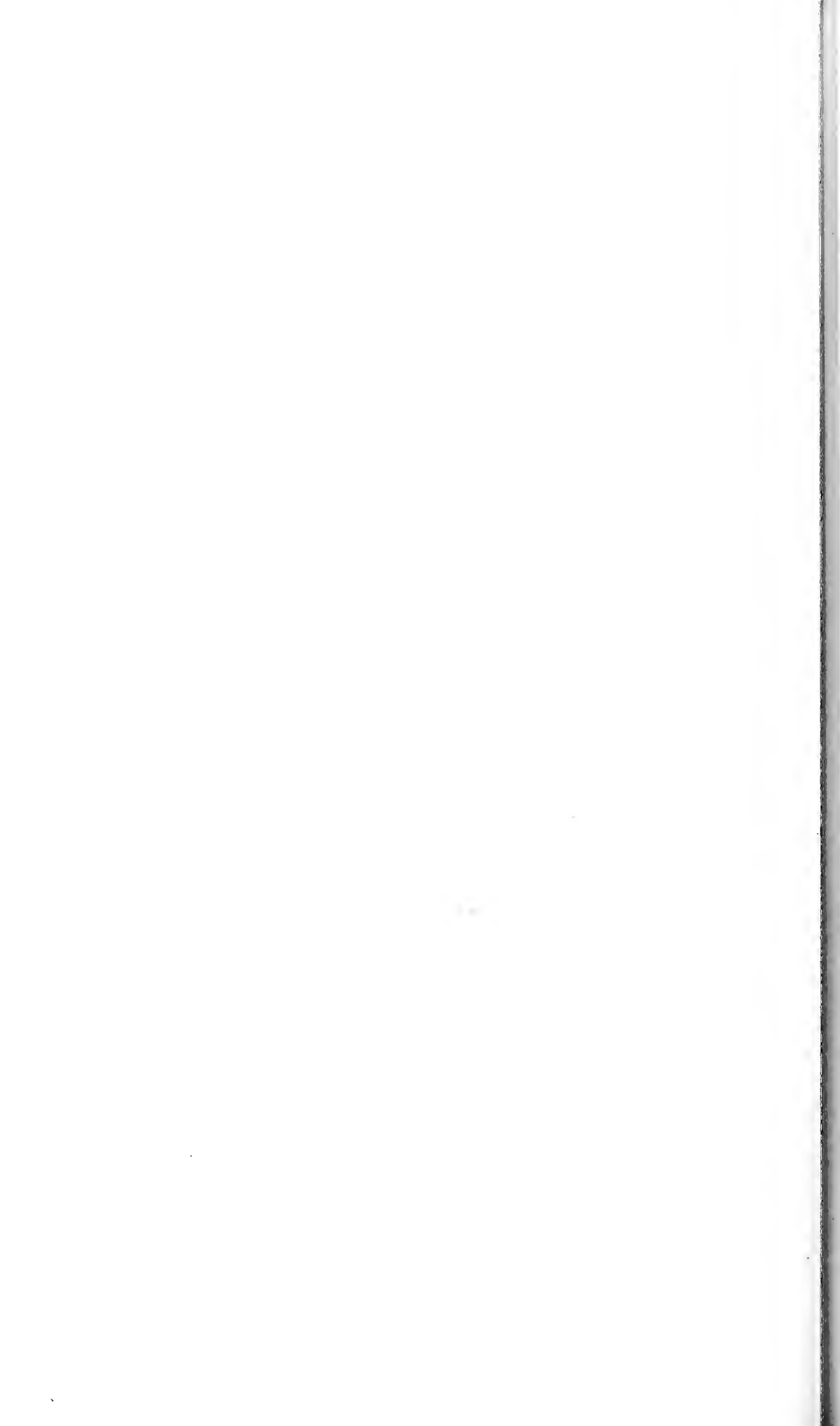

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RESPONDENT'S BRIEF.

Jurisdiction.

Respondent concedes that if the Board had jurisdiction, this Court has jurisdiction. Respondent asserts that the Board was without jurisdiction because the Complaint was issued more than six month after the alleged unfair labor practices allegedly occurred. Therefore the Complaint could not issue under Section 10(b) of the Act. (29 U. S. C., Sec. 160.)

The Complaint is at variance with the Charges and attempts to introduce new Charges which were not contained in the original Charges and which are barred by

limitations, and hence the Complaint and could not issue under the Act as amended, thus depriving the National Labor Relations Board and this Court of jurisdiction.

Section 10(b) of the Act provides in part as follows:

> "*Whenever it is charged* that any person has engaged in, or is engaging in, any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a *complaint stating the charges in that respect.* * * *
>
> "* * * that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *." (Emphasis added.)

The Charge states in part as follows [R. 2]:

> "That the Employer discharged employees Thomas Frederick and Clarence Leeper on or about December 28, 1950, upon the *grounds* that these employees *were engaging in union organizational activities* for the purpose of discouraging the formation of the Union." (Emphasis added.)

Paragraph 5 of the Complaint [R. 5-6] alleges:

> "Respondent did discharge Thomas Frederick on or about December 27, 1950, and did discharge Clarence Leeper on or about December 28, 1950, and at all times since said dates has refused and failed and does now refuse and fail to reemploy them for the *reason* that they *engaged in concerted activities* with other employees for the purposes of collective bargaining and other mutual aid and protection." (Emphasis added.)

The Charges allege that the discharge was because they engaged in *"union organizational activities."*

The Charge was filed February 1, 1951 [R. 1], which was within six months of the time of the occurrence of the unfair labor practice therein alleged.

The Complaint was filed November 14, 1951 [R. 11], which was more than six months after the occurrence of the unfair labor practice alleged therein, to wit, the discharge of Frederick and Leeper on or about December 28, 1950, on the ground of "concerted activities."

The Charge could not have been amended November 14, 1951, to allege that the discharge of the two employees was on account of "concerted activities." It would have been barred by the six months' limitations of the Act. (*Joanna Cotton Mills Co. v. N. L. R. B.,* 176 F. 2d 749, Appendix pp. 1-3.)

You cannot do indirectly what cannot be done directly. If the Charge could not have been so amended, then the Complaint cannot contain a new charge unless the additional or new unfair labor practice alleged was committed not less than six months prior to the filing of the Complaint.

There is a difference between discharging an employee on account of "union organizational activities" and "activities in behalf of a union" and discharging an employee because he has engaged in "concerted activities."

The Charges were filed by the International Union, United Automobile Workers of America, A. F. L. [R. 2-3]. The Complaint [R. 4] states "it having been charged by International Union, United Automobile Workers of America, A. F. L., hereinafter called the

Union, that * * * hereinafter called the Respondent, has been engaged in and is engaging in unfair labor practices."

The Complaint then states [R. 5] that the Union is a labor organization within the meaning of the Act, and then alleges [Par. 5] as above set forth. As stated above, the allegations in Paragraph 5 are not based on the ground of Union activity. The Complaint then [R. 6], in Paragraph 6, alleges an unfair labor practice because of Union activities. As hereinafter set forth, the Trial Examiner dismissed Paragraph 6 of the Complaint, thus striking out all allegations with respect to Union activities upon which the Charges were founded as alleged by the Union and as set forth in the Complaint.

Section 7 of the Act, in defining the rights of employees, states that employees shall have the right (1) to self-organization, (2) to form, join, or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, and (4) to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. There is a distinct difference between each of these rights, and the Act so recognizes the same.

The Charge in this case states that Frederick and Leeper were discharged on the grounds that they were engaging in Union organizational activities for the purpose of discouraging the formation of the Union. The Union in this case had already been formed and hence the only alleged ground of discharge could be that these employees were engaged in Union activities, which is at variance with the allegations of the Complaint.

The case of *Joanna Cotton Mills Co., (supra)*, originated on a charge filed with the Board by an A. F. L. Union in 1947 alleging that the company had engaged in various anti-union activities and had discharged Blakely, an employee, because of his membership in and activities on behalf of the Union. An amended charge was filed February 13, 1948, adding to the original charge an allegation that the company had discharged Blakely because he had engaged with other employees "in concerted activities for the purpose of collective bargaining and for other mutual aid and protection," and a copy of this amended charge was not mailed to the company until February 26, 1948, more than six months after the Act had become effective. The Board tried to say that the charge served more than six months after the effective date of the Act was an amended charge and that the original charge was filed and served in time. In holding that the charge was barred by the limitations of Section 10(b) of the Act, the Court held (p. 754):

> ". . . *The trouble, however, is that no charge relating to discharge for engaging in concerted activities, as distinguished from Union activities, was served upon the company until more than six months had elapsed after the Act had become effective.*
>
> ". . . *The amended charge,* which was expressly filed as a substitute, *alleged for the first time that the discharge was because* Blakely had engaged in *'concerted activities' other than in connection with* his *union membership,* and *thus brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge.*

"The Board argues that it was the discharge of Blakely that was charged as an unfair labor practice in both charges, *but the mere discharge of an employee is not an unfair labor practice* . . . The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.' (Citing cases.)" (Emphasis added.)

This Court, in the case of *N. L. R. B. v. Globe Wireless,* 193 F. 2d 748, held as follows:

"The charge filed with the Board alleged violations of §8(a)(1) and (3) only by the making of the discharges. There was no averment of the independent coercive violations just now discussed, the latter being later incorporated in the Board's complaint. The respondent claims that a complaint issued under the Act as amended is limited in scope by the averments contained in the charge filed to initiate the proceeding. We see no basis for this view. The Board would not appear to be debarred by the amended Act from enlarging upon a charge *unless the additional unfair labor practices alleged were committed more than six months prior to the enlargement*. The inclusion here of the charge of coercion was made within six months of the allegedly coercive conduct."

The holding of this Court in the *Globe Wireless* case is not contrary to the holding of the court in the case of *Joanna Cotton Mills,* as the appellant Board would tend

to lead one to believe (Board Br. p. 27). The court in the *Joanna Cotton Mills* case properly held that discharging an employee because of union activities is an entirely different charge from one alleging that an employee was discharged because he engaged in "concerted activities." Hence, a charge based upon concerted activities is an additional unfair labor practice if the original charge was based upon union activities.

This court, in the *Globe Wireless* case, (*supra*), stated that the Board would not appear to be debarred by the amended Act from enlarging upon a charge unless the additional unfair labor practices alleged were committed more than six months prior to the enlargement.

As stated above, the original Charge alleged that the discharge of the employees was because they engaged in union activities, which discharge was on December 28, 1950. The Complaint alleges that the discharge was because the employees engaged in concerted activities, and the Complaint was filed November 14, 1951. Hence, the new unfair labor practices alleged in the Complaint were allegedly committed more than six months prior to the issuance of the Complaint.

In the *Globe Wireless* case (*supra*), there was an additional unfair labor practice alleged (which was committed within six months of the issuance of the Complaint), while in the instant case there is an entirely different unfair labor practice alleged in the Complaint than in the Charge, and which was allegedly committed more than six months prior to the issuance of the Complaint.

Since the Complaint setting forth the entirely new unfair labor practice was filed more than six months after the alleged unfair labor practices were committed, it is

submitted that under the authority of the *Globe Wireless* case, decided by this court, the Board was deprived of jurisdiction and barred by the six-months' limitation of the Act.

Also in accord with the foregoing is the case of *Superior Engraving Co. v. N. L. R. B.,* 183 F. 2d 783 (C. A. 7), where the court stated, at page 790:

> "Consequently we conclude that the decisions relied on by the Board are in error and that petitioner is correct in contending that, of the unfair practices with which petitioner is charged in the union's second amended charge, those which occurred more than six months prior to the filing of the charge were wrongfully embodied in the complaint."

The Board attempts to argue (Board's Br. p. 22), that the only difference between the Complaint and the Charge is that the detailed averment in the Complaint is broad enough to describe not only a discharge for "union" activity but also a discharge for "concerted activity" not undertaken in behalf of a union, whereas the Charge refers specifically to "union" activity alone. The Board is wrong in its analysis of the Complaint. The Complaint [R. 5] plainly states that the Respondent discharged Thomas Frederick and Clarence Leeper for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection. The Complaint in no place mentions that the discharge was on the grounds that the employees engaged in union activities as set forth as the basis of the Charge [R. 2].

Hence the Complaint did not enlarge the original Charge and did not merely allege in more particularity the acts

constituting an unfair labor practice and did not constitute "at most a slight change in legal theory." The Complaint substituted and brought into the case a new and entirely different charge of unfair labor practice from that contained in the original Charge (*Joanna Cotton Mills, supra*), and therefore the Court is debarred by the amended Act because the additional unfair labor practices alleged in the Complaint were committed more than six months prior to the enlargement. (*Globe Wireless, supra.*)

The Board in its brief (p. 25), states that a majority of the circuit courts hold that a complaint under the amended Act may properly deviate from the charge provided only that the violations included in the complaint did not occur prior to the six months' period of limitation fixed by the filing and service of the charge. Respondent submit that this is not the law. We have found no cases that hold that a new and entirely different charge can be brought, whether by way of complaint or by way of an amended charge, unless the occurrence of the unfair labor practice was within six months of the date of the filing of the charge, the amended charge, or the complaint.

In *N. L. R. B. v. Westex Boot & Shoe Co.,* 190 F. 2d 12 (C. A. 5), the court stated: "A charge is a condition precedent to the Board's power to issue a complaint." While Respondent feels this is a correct statement of the law, yet, assuming that a complaint can issue even though no charge was filed, it certainly cannot be argued under the Act as amended that in such case a complaint can be issued more than six months after the occurrence of the unfair labor practice. The Board in its brief (p. 27), stated that the *Westex* case, *supra,* was exactly like

the Complaint in this case. We do not so interpret the *Westex* case. In the *Westex* case, the court stated:

> "It seems to us that in this case, the complaint merely 'elaborated the charge with particularity' (citing cases) and that the respondent's contention that the Board lacked jurisdiction because the complaint included alleged unfair labor practices not stated in the charge is not well founded."

In the instant case, as stated above, the Complaint was not based upon the Charges and contained entirely new and different Charges.

The Board in its brief (p. 27), cites the case of *Katz v. N. L. R. B.*, 196 F. 2d 411 (C. A. 9), in support of its contentions. In this case this Court merely held that the Charge was sufficient to support the allegations of the Complaint and that the Complaint was not too general.

The Board in its brief (pp. 25-27), cites various cases which Respondent has discussed and distinguished in the appendix, pages 4-8.

The six months' period of limitation contained in Section 10(b) of the Act is not merely a statute of limitations but is a statute depriving the Board of jurisdiction over the barred charges.

Section 10(a) of the Act (29 U. S. C. A., Sec. 160(a)), provides that "The Board *is empowered, as hereinafter provided,* to prevent any person from engaging in any unfair labor practice (listed in Sec. 158 of this Title) affecting commerce." This provision is obviously one granting power and jurisdiction to act only within the time provided in the Act for the power is restricted "as

hereinafter provided." Subsection (b) of Section 10 provides in part *"that no complaint shall issue* based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." This provision is not merely a statute of limitations but it goes to the very jurisdiction of the Board and deprives it of power and jurisdiction to issue a complaint after the expiration of the six months' period. Since the charges of unfair labor practice which are contained, and for the first time alleged, in Paragraph 5 of the Complaint, were issued more than six months after they allegedly occurred, both the Board and the Examiner were without power to entertain them and were without jurisdiction to make any findings based thereon.

There is a marked and wide distinction between a pure statute of limitations and a special statutory limitation which qualifies or confers a given right only where the right is exercised within the time provided in the statute. In the case where the right to proceed is given by a statute containing a condition precedent that it must be exercised within a given period, the exercise of the right within that period is essential to the existence of the cause of action. If the right is not exercised within the statutory period, it is wholly extinguished.

Thus, in the case of *O'Neill v. Cunard White Star Limited,* 69 Fed. Supp. 943, the court considered a provision of the Jones Act which incorporated by reference a section of the Employers Liability Act which read, *"No action shall be maintained* under this Chapter unless commenced within three years from the day the cause of action accrued." The court, in holding that this provision

was one limiting the right created by the statute, said at page 945:

> "The quoted provision of §56 'is one of substantive right, setting a limit to the existence of the obligation which the Act creates.' It is a limitation on the right created by statute. Engel v. Davenport, 1926, 271 U. S. 33, 38, 46 S. Ct. 410, 412, 70 L. Ed. 813."

The language of Section 10(b) of the National Labor Relations Act is very similar to that contained in the Jones Act.

Wilson v. Missouri Pacific R. Co., 58 Fed. Supp. 844, involved an Arkansas statute granting a cause of action for wrongful death. It provided that "every such action shall be commenced within two years after the death of such person." The court held that this statute prescribed, as a condition precedent to the right granted, that the action be begun within two years after death and that if not instituted within that time, not only could the action not be maintained at all but that the defendant could not waive nor be estopped from raising the question, and numerous authorities are cited sustaining the holding of the court.

Under these and other authorities therefor, it is manifest that the failure to issue the Complaint within six months after the occurrence of the alleged unfair labor practices deprived the Board and the Trial Examiner of jurisdiction.

It is somewhat difficult to determine from the Trial Examiner's Intermediate Report and the Conclusions of

Law therein whether or not he held that Respondent was guilty of discharging Frederick and Leeper because they were engaged in union activities with respect to the Union. If the Trial Examiner so found, it was not within the issues and facts stated in the Complaint and he and the Board were without jurisdiction. [See Compl., Par. 5; R. 5.]

If the Trial Examiner found that Respondent was guilty of discharging said two employees because they engaged in concerted activities for the purpose of collective bargaining and for other mutual aid and protection, then the Complaint is at variance with the Charges, and contains new Charges which are barred by the six months' limitation of the Act, and over which neither the Board nor the Trial Examiner has jurisdiction.

If the new Charges added by the Complaint are stricken therefrom, then the only thing that Paragraph 5 thereof would allege is that Respondent discharged Frederick and Leeper. The mere discharge of an employee is not an unfair labor practice. (*Joanna Cotton Mills, supra.*)

In view of the fact that the Trial Examiner, as hereinafter set forth, dismissed Paragraph 6 of the Complaint on Respondent's motion [R. 12], the Board, by reason of the foregoing, with respect to the allegations in Paragraph 5 of the Complaint should have dismissed the whole of the Complaint. Without the allegations of Paragraphs 5 and 6 of the Complaint, the Complaint would not allege sufficient facts to show a violation of the Act by Respon-

dent. Also, since the Trial Examiner dismissed Paragraph 6 of the Complaint, and since Paragraph 5 added new Charges, which cannot be done because of the six months' period of limitation as aforesaid, there is nothing left in the Complaint or in this case.

Respondent raised the above jurisdictional question with the Board.

For the foregoing reasons alone, the Court should set the order of the Board aside, dismiss the Complaint, and refuse to grant an order to enforce the Board's order, and the Court need not consider the other questions in the case.

However, Respondent will nevertheless point out other reasons why the Complaint should be dismissed, even assuming there was no new Charge set forth in the Complaint and assuming that the Complaint alleged that both Frederick and Leeper were discharged because they engaged in union activities with respect to the Union.

Statement of the Case.

Respondent controverts the statement of the case as presented by the Board.

The Board in its brief (p. 2) states that Thomas Frederick was the Union's chief promoter in the plant and that (p. 3) Frederick served as the "Union's one-man organizing committee." It is submitted that there is no evidence to this effect.

In many other respects Respondent feels that the Board has not presented to the Court a complete and correct summary of the evidence.

1. The Board's Findings of Fact and Conclusions of Law.

The Charges allege that Respondent discharged Thomas Frederick and Clarence Leeper because of Union activities with respect to the Union.

The International Union, United Automobile Workers of America, A. F. L., filed the Charges [R. 2-3]. The Trial Examiner in his Intermediate Report, concurred in by the Board, found that Respondent discharged Frederick [R. 23], because of his activity in behalf of the Union and because he sought to secure the support of other employees in concerted activities, and found [R. 20] that by discharging Leeper Respondent discouraged concerted activities among its employees, and, as a conclusion of law [R. 26-27] the Trial Examiner held that these charges discriminated in regard to the hiring and tenure of employment of said two persons and hence Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act and that by such discrimination Respondent interfered with, restrained and coerced its employees in the rights guaranteed in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

Respondent in its answer [R. 7], denied the various allegations of the Complaint and alleged that Respondent discharged said Frederick for cause, and alleged that said Leeper quit his job.

2. The Evidence.

Respondent employer is a partnership engaged in the business of manufacturing gas and oil burners and combustion equipment, doing a general machine shop business, and especially manufacturing Jatos, which are jet assist take-off rockets. The manufacturing plant and office of Respondent are located at Whittier, California, and at the time of the hearing Respondent employed about 120 persons [R. 151, 160].

Based upon the Charges, the two factual questions presented are:

(a) Did Respondent discharge Frederick for cause or because he engaged in Union activities?

(b) Did Leeper quit his job or was he discharged by Respondent because he engaged in Union activities?

The evidence introduced at the hearing will be analyzed separately with reference to that evidence (1) concerning Frederick, and that evidence (2) concerning Leeper. The evidence with respect to Frederick will be set forth under two general subdivisions:

(a) Evidence with reference to the circumstances surrounding his discharge; and

(b) Evidence concerning his Union activities.

The evidence with respect to Leeper will be set forth under two general subdivisions:

(a) Evidence with reference to the circumstances surrounding his quitting his job; and

(b) Evidence concerning his Union activities.

3. Thomas Frederick.

Frederick testified [R. 87], that he was first employed by Respondent on August 2, 1946; that he was laid off twice [R. 88]; that after he was laid off he talked to Mr. Martin, co-partner of Respondent, about being re-hired [R. 88]; that he started to school in February, 1949 and finished in February, 1951 [R. 100]; that he was married in November, 1950; that while attending school he worked as a part-time employee of Respondent [R. 100]; that he was a part-time worker until he was discharged on December 28, 1950 [R. 89], and that he was averaging about 30 hours a week employment. Martin, co-partner of Respondent, testified [R. 197], that the reason for Frederick's first lay-off was a cutback in their program and the fact that he was not capable of being shifted into another job at that time; that the reason for Frederick's second lay-off was that his work had been getting sloppy; that [R. 198] after the second lay-off Frederick came to see him (Martin) and said he wanted to continue with his schooling; that he (Frederick) knew he had not done too good a job but if he were given another chance, on a part-time basis, to help him to go back to school, he would do a good job for Respondent, and that Martin rehired him to help him out and Frederick went to work on carbons.

(a) Evidence With Reference to the Circumstances Surrounding Frederick's Work and Discharge.

Frederick had been working on axles [R. 170] and turned out fair work. When Respondent's work of making axles slowed down, Frederick was given the work of marking inserts out of a solid carbon bar. Frederick worked on carbons for about two years, during which time he was going to school and working part time [R. 171]. About three weeks before he was discharged and just before the holidays in 1950, Frederick told Respondent's foreman Gilly [R. 171-172, 181] that he would quit if he had to stay on the carbon job. Respondent then put Frederick on work of setting up and breaking down various machines [R. 182]. During these three weeks Frederick also did some work of operating machines [R. 101]. His work did not prove satisfactory. He was discharged for this unsatisfactory work after the holidays, on December 28, 1950.

Frederick testified [R. 92-93] that he was discharged by Edward C. Gilly, foreman of Respondent at the time of his discharge, and that Gilly told him that Fred Nemec had been watching him and said he hadn't been cleaning his machines properly and that he was being laid off. Frederick testified [R. 95] that on the day of his discharge he was helping set up a 4-spindle automatic and that he broke a drill holder on the machine [R. 96]. He further testified [R. 97] that one of the last jobs he had was building jigs to hold the Jato tanks, and that the work which he was doing at the time he was discharged including cleaning machines and that he thought he did clean the same. He also testified [R. 101] that at the time of his discharge he also was operating machines.

Frederick testified that he tried to prod Gilly about the Union at the time he was discharged and also tried to make Gilly tell him he was being discharged because of his Union activities, but that Mr. Gilly did not so state [R. 106-107].

Walter W. Koontz, a witness employed by Respondent for over 15 years as a machinist, testified [R. 151] that he observed Frederick and that after Frederick started going to school, his work slacked down.

Frederick A. Nemec, one of the partners of Respondent, testified [R. 158] that he observed that Frederick was very negligent in the care of his machines and moved very slowly and didn't seem to care whether he worked or not, and that he did not treat Respondent's equipment properly.

Edward C. Gilly testified [R. 169] that he was shop foreman at Respondent's plant and had been employed by Respondent about 10 years; that he knew Frederick and the type of work Frederick did; that Frederick had been working on carbons and that about three weeks before Frederick was discharged [R. 171-172] Frederick told him that if he had to run carbons any more he was going to quit. Gilly explained to him that since he was working only a few hours a day and going to school, it was the only job he could use Frederick conveniently on. Gilly testified that he reported to Mr. Martin, one of the partners of Respondent, concerning Frederick stating that if he had to work on carbons he would quit [R. 172] and that Mr. Martin told him to keep him on for awhile, *until after the holidays anyway.* Gilly testified [R. 172-173] that Frederick did not keep his machines clean and that he spoke to him several times about it,

without any results, and that it was a company policy for employees to keep the machines clean. Gilly further testified [R. 173-174] that when he reported to Mr. Martin that Frederick no longer wished to run carbons and wanted to quit, that he (Gilly) told Martin that he was not satisfied with Frederick's work and that Frederick seemed to have lost all interest in his work and in his job.

Gilly testified [R. 174-175] that a week before Frederick was discharged he was working on the reassembly of a Potter & Johnson automatic machine and used the sledge hammer on the same and that he (Gilly) instructed Frederick not to do so and, despite this instruction, Frederick continued to use the sledge hammer; that he was hammering on a cast iron drum and that, if it had broken, the drum could hardly be replaced.

On the day Frederick was discharged he was working on a tool holder, which was part of an Acme 4-spindled automatic machine. Gilly instructed him how he wished this tool holder fixed and Frederick disregarded his instructions and broke the tool holder [R. 176-177.] Gilly then reported this matter to Mr. Martin, who gave him permission to discharge Frederick [R. 177]. That he (Gilly) then went to the office and had Frederick's time prepared as of quitting time, and gave him his check. Gilly testified [R. 178] that when he discharged Frederick he told him that he did so because he did not keep his machines clean and because of other incidents, such as using a sledge hammer and breaking the tool holder.

Mr. Martin, one of the partners of Respondent, testified [R. 194-195], concerning his conversation with Gilly in which Gilly told him that Frederick would quit if he

had to continue to work on carbons, that Gilly told him that Frederick's work had not been satisfactory and that he should be kept on the carbons; that since replacing Frederick on the carbons, Respondent put another man on the job who turned out three times as much work as Frederick did; that he (Martin) knew that Frederick was not doing a good job, but he was trying to give him a chance. Martin testified [R. 199] that he told Gilly he did not like to lay Frederick off just before Christmas because it looked bad as a company policy. Martin further testified [R. 200-201] that when Gilly reported to him that Frederick had broken a tool holder, which was after Christmas, that he authorized Gilly to discharge Frederick because of Frederick's work. Gilly had told him that Frederick had disregarded his instructions again and that he wanted to lay him off; that he (Martin) gave Gilly authority to discharge Frederick because of reports he had received from Gilly and because of his personal observation of Frederick. On cross-examination Martin again testified [R. 208] that he told Gilly not to lay Frederick off during the holiday season.

Bess L. Nemec, wife of Fred Nemec, testified [R. 212] that she had worked continuously from 1926, when the company started business, to the present time, and that she was the office manager and that [R. 212] she observed Frederick's work in the latter part of 1950 and thought he was "gold-bricking on the job."

(b) Evidence Concerning Frederick's Union Activities.

William Pounds testified [R. 50] that he was the International Representative of the Union in the Los Angeles Area and as part of his duties he conducted organizational activities at Respondent's plant and that

[R. 51] he contacted Frederick in October of 1950, to help in this organizing.

William Smith testified [R. 54] that he was an International Representative of the Union and that [R. 55] he gave Frederick Union authorization cards and that [R. 56] Frederick gave him approximately 55 signed cards on December 28, 1950.

Frederick testified [R. 90] that he talked to employees of Respondent about the Union starting in October, 1950 and that he handed out Union cards to the employees all through the plant and collected the cards from the employees all through the plant and that he did this on December 27 and 28, 1950. Frederick testified [R. 90-91] that Gilly, Foreman of Respondent, saw him pass out cards and that on the night of the 28th he (Frederick) jokingly asked Gilly to sign a card. Frederick testified [R. 97-98] that he did not openly distribute handbills around the plant, but passed out cards in the washroom and distributed some in the washroom and that he passed out Union cards on Company time and on Company property [R. 102] all day long on and off while he was working, and that he talked to the employees at the time he gave out the cards and that he had previously done so on Company time [R. 103]. Frederick testified [R. 105] that he did not give Gilly a Union authorization card to sign, but only jokingly asked him why he did not sign a card. *Frederick testified that neither Martin nor Nemec, partner of Respondent, saw him pass out the cards* [R. 105] *and that he handed out these Union*

authorization cards on the sly and not openly as far as management was concerned [R. 119].

Fred Nemec testified [R. 159] that *he did not know that Frederick was handing out these Union authorization cards to employees.* Gilly testified [R. 178-179] that the dismissal of Frederick had nothing to do with the fact that Frederick was or was not engaged in Union activities and that different employees in the plant were signing other employees' names to the cards and passing them around.

Martin testified [R. 201-202] *that his authorization to Gilly to discharge Frederick had nothing to do with Union activities of Frederick and that he did not know that Frederick was engaged in Union activities until after Frederick was discharged* and that the first time he knew that Frederick was engaged in Union activities after his discharge was when a Mr. Grisham, a Union organizer, called Mr. Nemec in his presence and stated that Frederick was a Union organizer in the plant.

Bess Nemec testified [R. 218-219] that she never saw Frederick handing out any bills and that [R. 220] *she did not know that Frederick was engaged in Union activities* prior to his discharge and did not learn it until after he was discharged.

Raymond Nemec, one of the partners of Respondent, testified [R. 224-225] that he never saw Frederick passing out Union cards or handbills and did not know that he was engaged in Union activities.

4. Clarence Leeper.

Clarence Leeper died June 10, 1951 [R. 124]. He was employed by Respondent as a welder on the night shift [R. 58].

(a) Evidence With Reference to the Circumstances Surrounding Clarence Leeper Quitting His Job.

Herbert J. Snodgrass an employee of Respondent testified [R. 59-60] that in December, 1950 [R. 57] that the welders on the night shift contacted the night superintendent of Respondent, stating that they wanted a night bonus and paid-lunch period. The night superintendent called Fred Nemec [R. 59] who came to the plant [R. 59-60] and a conversation was had in which Leeper did most of the talking and Snodgrass further testified [R. 60] that Leeper asked [R. 69-70] for a shift bonus and pay for the lunch period and that Mr. Nemec stated he would check into it and call different companies and find out what they were paying and at that time *Leeper told Mr. Nemec he would give him 24 hours in which to grant these demands or he, Leeper, was going to quit.* Snodgrass again testified on direct examination [R. 60] that Leeper made the statement he would give Mr. Nemec 24 hours in which to give him an answer and if he hadn't answered within that time *that he was quitting.* Snodgrass testified [R. 71] that Leeper stated that if he did not get the lunch-hour bonus *he would quit* and that Leeper did not say anything [R. 71-72] about coming back and getting his tools, but that he said he would quit and that he was through. That at this meeting with Fred Nemec [R. 71-72] *there was no discussion whatsoever concerning the Union and that Leeper always talked*

away from the Union side and Snodgrass testified [R. 72] in response to a question by the Trial Examiner that he, Snodgrass, had the impression *that Leeper was against the Union.*

Lee Grimm testified [R. 143] that he was employed by Respondent from about December 1, 1950, as a welder and that he was present on the night of December 27, 1950, and that he heard a conversation between Mr. Nemec and Mr. Leeper in which [R. 144] Leeper wanted to get a shift bonus and that Mr. Nemec told him he would have to check and find out what different plants were paying for shift bonuses, and that [R. 145] *Leeper told him he would quit,* and that he, Grimm, did not recall any conversation in which Leeper said he would give Nemec 24 hours to check on the matter and that [R. 146] *Leeper told Fred Nemec he was quitting.*

Grimm's testimony was very positive concerning the fact Leeper was quitting and when again asked [R. 147] if it was his testimony that Leeper told Nemec if he didn't get the shift bonus and the lunch hour-period pay he was quitting, Snodgrass answered "that is absolutely right." Snodgrass further testified [R. 147] that in said conversation not a word was said at all about Union activities. Fred Nemec testified [R. 153] that at this conversation on the night shift of December 27, 1950, *Leeper told him* that if he could not get a night shift bonus and pay for the lunch hour retroactively, *that he, Leeper,* would quit. At this conversation Nemec testified [R. 153] that one of the welders told Leeper he would have to speak for himself.

Nemec testified [R. 154] that on the following day he and his son were going over to Respondent's yard which

was close to Mr. Leeper's home so he took Mr. Leeper's check to him to save Mr. Leeper a trip in to get it and that when he arrived at Mr. Leeper's home he was met by Mrs. Leeper and told her [R. 155-156] that Mr. Leeper had quit and that Mr. Leeper had given Respondent an ultimatum of several things he wanted and that Respondent could not meet Leeper's demands and were therefore letting him quit. He told Mrs. Leeper that he hated to see Leeper go because he was one of the best welders and did not tell her that he was an agitator, but that he had gotten the welding shop into an uproar.

Nemec further testified [R. 131, 159-160] that Leeper went to Respondent's office on December 28, 1950, to discuss whether or not Respondent would hire him back as he had quit, which Respondent refused to do and Mr. Leeper then asked for four-hours reporting pay for the reason that he had taken his time to come in and he, Leeper, thought he was entitled to it. Raymond Nemec, one of the partners of Respondent, testified [R 224] that in the conversation between Leeper and Fred Nemec, Fred Nemec told Leeper that he did not deserve the four-hours pay, but that he would nevertheless give it to him.

Gilly testified [R. 179-180] that Leeper came to the plant on December 28, 1950, and asked him to get his tools for him and that Leeper told him *he was sorry that he had quit* and that he wanted to talk to Mr. Nemec [R. 189].

(b) Evidence Concerning Leeper's Union Activities.

There was absolutely no evidence whatsoever concerning any Union activities of Mr. Leeper. With respect to Union activities in general, Snodgrass testified [R. 73] that Mr. Martin or Mr. Nemec, partners of Respondent, told him that the employees were free to join a Union or not as they saw fit, and that they were not to be intimidated by anybody in any way.

Fred Nemec testified [R. 156] that in the conversation he had in the plant on the evening of December 27, 1950, with Mr. Leeper and other welders that nothing whatsoever had been said about Union demands or Union activities.

Fred Nemec's testimony is completely uncontradicted and even the Trial Examiner had regarded Fred Nemec generally as a creditable witness [R. 120].

Fred Nemec further testified [R. 166-167] that he had no knowledge of any Union activities by Leeper and *that Leeper told him that if a Union came in the plant that he, Leeper, would quit.* Nemec testified that other employees, some of whom he named, had expressed themselves in favor of the Union and that they were not discharged for so doing and continued working for Respondent.

Respondent's Motion to Dismiss.

The Trial Examiner granted Respondent's motion [R. 139] to dismiss that portion of the Complaint set forth in Paragraph 6 thereof [R. 6], upon the ground of insufficient evidence.

The Board in its decision and order [R. 37], in which the Board adopted the findings, conclusions and recommendations of the Trial Examiner, stated, "The Trial Examiner also found that the Respondents had not engaged in an independent violation of Section 8(a)(1) of the Act and consequently dismissed that portion of the Complaint."

Therefore Respondent in its defense to the Complaint only introduced evidence to meet the charges that Frederick and Leeper were discharged because they engaged in union activities.

The Trial Examiner held, and correctly so, that the Chief Counsel had not made out a *prima facie* case that Respondent had interfered with, restrained, or coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and hence the Trial Examiner granted the motion to dismiss the charges in Paragraph 6 of the Complaint [R. 137-139].

Having admitted at the trial that insufficient evidence was introduced by the Chief Counsel, how now can the Trial Examiner hold and conclude, and how can the Board adopt such findings and conclusions, that the Respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1)

of the Act. [Par. 3, Conclusions of Law, Intermediate Report, R. 26.]

The conclusions of law thus reached by the Trial Examiner are not only unsupported by the evidence and the facts as so stated by the Trial Examiner at the hearing, but the Trial Examiner, by dismissing that portion of the Complaint as above set forth at the time of the hearing, agreed that a *prima facie* case had not been made by Chief Counsel. How, then, can the Trial Examiner now conclude as a matter of law that Respondent has violated Section 8(a)(1) of the Act? It would be the most unfair thing in any hearing for a Trial Examiner at the end of the Chief Counsel's case to dismiss a count of a complaint, thus making it unnecessary for the Respondent to meet the allegations thus dismissed and then have the Trial Examiner hold and find that Respondent engaged in unfair labor practices with reference to that portion of the complaint so dismissed.

The Charges filed by the Union [R. 1] specifically state that Respondent discharged Frederick and Leeper upon the grounds that these employees were engaged in union organizational activities, "for the purposes of discouraging the formation of the Union," and the Charges further allege that said activities of Respondent were wilfully and deliberately conducted for the purpose of "discouraging the organization of the Union." The Union not only filed the Charges but is a party to the Complaint filed by the Union, which is based upon the Charges. Of course the Union was already organized in this instance.

Hence, the only charge and allegation, if any, that Respondent was required to meet was that Respondent discharged Frederick and Leeper upon the ground that

these employees were engaged in union organizational activities for the purpose of discouraging the formation of the International Union, United Automobile Workers of America, A. F. L., and Respondent was not charged, nor was there any evidence introduced, that Respondent interfered with, restrained or coerced Frederick or Leeper with respect to their right to self-organization or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Trial Examiner dismissed that portion of the Complaint alleging such a violation of the Act.

In spite of the fact that the Trial Examiner granted Respondent's motion to dismiss, the Trial Examiner in his Intermediate Report still tries to hold that the union activities in which Leeper was alleged to have engaged did not concern the Union which filed the Charges. In this respect the Intermediate Report [R. 20] states as follows:

> "I find that by discharging Leeper on December 28, 1950, the Respondents discouraged concerted activity among their employees and thereby violated Section 8(a)(1) and (3) of the Act."

This is also true in the Intermediate Report concerning Frederick [R. 23].

The Trial Examiner, in his Report [R. 26], states as follows:

> "The unfair labor practices in which Respondents have been found to have engaged manifest an attitude of opposition to the basic purposes of the Act and justify an inference that commission of other unfair labor practices may be anticipated. In order

> to effectuate the guarantees of Section 7 of the Act it will therefore further be recommended that the Respondents cease and desist from in any manner interfering with, restraining, or coercing *their* employees in the exercise of rights guaranteed by the Act." (Emphasis added.)

Taking the last sentence first of the above quoted portion of the Report (concurred in by the Board), we wish to call the Court's attention to the fact that the Trial Examiner states that he will recommend that the Respondent cease and desist from in any manner interfering with, restraining or coercing the rights of its employees. This of course goes completely beyond the scope of the Charges and also of the Complaint, after the granting of the motion of Respondent to dismiss therefrom the allegations contained in Paragraph 6 of the Complaint. The Intermediate Report [R. 12, 13] plainly shows that all that was left in the case after granting of the motion, if anything, were the allegations of unfair labor practice contained in Paragraph 5 of the Complaint [R. 5] with respect to Frederick and Leeper. Hence the Trial Examiner, in saying that Respondent should be punished for coercing *their* employees, brings back into the case allegations and charges that were once dismissed. This of course makes invalid the Conclusion of Law No. 3 [R. 26] of the Intermediate Report and the order of the Board based thereon.

With reference to the first sentence of the above quoted quotation from the Intermediate Report, there simply was no evidence introduced showing that Respondent has manifested an attitude of opposition to the basic purposes of the Act and that the same justified an inference that

commissions of other unfair labor practices may be anticipated. As will be shown below, inferences are not evidence and the Trial Examiner has no right to make an inference.

As a matter of fact, the evidence shows that Respondent did nothing that was anti-union and witnesses called by the Chief Counsel testified that they were free to do as they chose so far as Respondent was concerned.

The Trial Examiner Should Have Made Findings of Fact and Conclusions of Law in Accordance With His Dismissal of Paragraph 6 of the Complaint.

When a defendant's motion to dismiss a complaint for insufficient evidence is granted, the ruling is the equivalent of an involuntary nonsuit and the defendant is entitled to findings in his favor on the merits.

Federal Rules of Civil Procedure, 52(a);

Bach v. Friden Calculating Machine Co. (C. C. A. 9), 148 F. 2d 407;

Gary v. Columbia Pictures, 120 F. 2d 891;

Young v. United States, 111 F. 2d 823;

Warren v. Haines, 126 F. 2d 160.

The Trial Examiner should therefore have made (1) findings in favor of Respondent on all of the charges contained in Paragraph 6, and (2) appropriate conclusions of law that Respondent did not interfere with, restrain or coerce their employees in the exercise of the rights guaranteed by the Act.

Instead of so doing the Trial Examiner, contrary to law and the evidence, has recommended a cease and desist order, directing the doing of things which Respondent never did or threatened to do.[1]

Frederick Was Discharged for Cause. Leeper Quit His Job.

The Findings of Fact of the Trial Examiner, as set forth in his Intermediate Report, are contrary to the evidence adduced at the hearing.

The evidence as to Frederick and as to Leeper shows that neither of them was discharged because of union activities, and the preponderance of evidence as to Frederick shows that he was discharged for cause and as to Leeper that he was not discharged at all, but that he quit.

The Board in its brief [R. 7, 8] tries to state that Respondent claims that Frederick was discharged because of a single cause, to wit, failure to clean machines, and

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[1]The United States Supreme Court in *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, at 799, stated:

> "* * * At that hearing the employer has the right to file an answer and to give testimony. This testimony, together with that given in support of the complaint, must be reduced to writing and filed with the Board. The Board upon that testimony is directed to make findings of fact and dismiss the complaint or enter appropriate orders to prevent in whole or in part the unfair practices which have been charged. Upon the record so made as to testimony and issues, courts are empowered to enforce, modify or set aside the Board's orders, subject to the limitation that the findings of the Board as to facts, if supported by evidence, are conclusive.
>
> "Plainly this statutory plan for an adversary proceeding requires that the Board's orders on complaints of unfair labor practices be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties. Such procedure strengthens assurance of fairness by requiring findings on known evidence. * * *."

that this was "an ancient complaint," and in doing so, the Board attempts to bring the facts of the instant case within those of *N. L. R. B. v. San Diego Gas & Electric Co.,* No. 13,525, decided by this Court on June 25, 1953.

Frederick himself testified [R. 97] that during the last part of his employment his work did include cleaning machines, and he testified as follows:

> "Q. Did any of that work include cleaning machines? A. *You do work on an engine lathe at times, that type of work. I was supposed to clean that and I think I did.*"

Respondent thought differently than did Frederick, and offered testimony that Frederick did not keep his machines clean. Hence it was not an "ancient complaint," but was one that existed up to the very time of Frederick's discharge. The evidence also clearly shows, and is not contradicted, that Frederick stated that he would quit if he was not put on other work than carbons; that he slowed down in his work; and that about a week before he was discharged he used a sledge hammer on one of Respondent's machines, contrary to the foreman's orders, and did so after he was specifically told to stop; and that on the day he was discharged he broke a tool holder because he had disobeyed expressed orders in the methods of using the same. Yet the Trial Examiner attempts to draw an inference from the fact that on the day Frederick was discharged he handed out union authorization cards to employees that he was discharged because of his union activity. This was but a coincidence. Did the fact that he broke a tool holder against expressed orders on the day of his discharge have any connection with his union activities? The breaking of the tool holder was a fact

and was the culmination of a long list of unsatisfactory work on the part of Frederick that caused him to be discharged.

The Trial Examiner was forced to admit in his Report [R. 21] that:

> "I believe the record fairly establishes that Frederick was remiss in some of the qualities that an employer would seek in a good workman."

The Trial Examiner, while admitting this, yet tries to argue that Frederick was not discharged for cause.

There is absolutely no evidence that Frederick was discharged because of union activities as alleged in the Charges. Elwood C. Martin, Fred A. Nemec and Robert W. Nemec, co-partners, and Besse Nemec, wife of Fred Nemec, who worked as office manager, all testified that they did not know Frederick was engaged in any union activities until after he was discharged. Their testimony was unimpeached and uncontradicted. Gilly testified that he did not discharge Frederick because of union activities but because he was not doing his work properly. Frederick did not testify that he showed Gilly any cards that he was passing out and it is only a matter of inference to say that Gilly knew it. Frederick did say that he jokingly asked Gilly why he did not sign a union authorization card but the testimony at the hearing was that these cards were passed out in Respondent's plant and some men were signing other men's names to the cards. Frederick admitted that he broke the tool holder and in doing so had gone contrary to Gilly's instructions. That of itself was sufficient to discharge him.

In the Trial Examiner's Intermediate Report [R. 17] he stated that Gilly admitted that Frederick may have offered him a union designation card for signature. This is only the statement by the Trial Examiner tending to show that Gilly had any knowledge of Frederick's union activities, and as shown by the evidence as stated above, many union cards had been passed around in the shop and other men were signing other people's signatures to the same, and hence it probably was a joke and when Frederick stated that he jokingly asked Gilly to sign a card, Gilly probably considered it as a joke because other men were signing other people's names to cards. Frederick testified [R. 105] that he did not give Gilly a card. Gilly testified that he did not discharge Frederick because of union activities and there is not the slightest bit of evidence to show that he did.

The Trial Examiner in his Report [R. 21] states that Gilly's testimony "that he was not aware of Frederick's activity in soliciting employees to sign union authorization cards was, to say the least, disingenuous." The more this report is read the more prejudicial it becomes. Frederick himself testified that he passed the cards out on the sly and did not wish management to know it, and if this is true it can be assumed from Frederick's own testimony that Respondent did not know it. The Trial Examiner [R. 21] says that Respondent pampered Frederick because they did not discharge him when he refused to operate the carbon cutting machine, and from this "pampering" the Trial Examiner draws the odd conclusion that he was discharged for union activities. If you pamper an employee, you normally do not discharge him for union activities. Respondent did not pamper Frederick. Respon-

dent tried to give him every possible chance and particularly did not wish to discharge him just prior to the holidays, which we feel is something for which Respondent should be commended and not condemned.

The Trial Examiner states in his Report [R. 21-22] that the incident about the sledge hammer had a ring of unreality about it and that Gilly's testitmony about it is difficult to evaluate, and the Trial Examiner criticizes Gilly for giving instructions to use a wooden block, the Trial Examiner stating that Gilly asked Frederick "weakly" to use the block. The way the Trial Examiner has written his report cannot help but show that he was prejudiced. There was nothing unreal about the use of the sledge hammer and Frederick did not deny it. The Trial Examiner cannot attempt to say how orders should be given and how machinery should be repaired.

The incident about the sledge hammer was very real. An employer does not have to let his employees beat his machines to pieces and then be accused of unfair labor practice for discharging them.

The Trial Examiner [R. 22] makes an amazing statement, as follows:

> "Whether Frederick actually was at fault in breaking the tool holder I consider immaterial."

There is no question but that Frederick broke the tool holder because he disobeyed Gilly's express order. Frederick admits he broke the tool holder. That of itself is sufficient to discharge an employee. Breaking company tools because of disobedience of orders is a grave thing, and if the Board commences to condone such actions, then the whole labor situation will be placed in a chaotic

situation. The Trial Examiner in his prejudice could not think of anything better to say than that he considered the breaking of the tool holder immaterial. It shows the great weakness in his report. The Trial Examiner tries to say that since Gilly did not go into detail in all these matters when he discharged Frederick, that they did not constitute the cause of discharge. That, of course, is ridiculous. The Trial Examiner [R. 22] concludes that when Frederick was discharged Gilly was hard put to find a plausible reason for it and that the incident about the sledge hammer and broken tool holder played no part in Frederick's discharge. That of course is a false conclusion of the Trial Examiner and is not based upon the evidence at all. The Trial Examiner then states [R. 22] that in these days of full employment and serious worker shortage, employees generally speaking are not lightly discharged. There was no evidence of a serious worker shortage in this area and as a matter of fact there is none.

The Trial Examiner states a very curious thing in his Report [R. 23], as follows:

> "I believe that the Respondents are intelligent enough to accept the fact that employees have a right to form labor organizations and to be represented in matters of collective bargaining. However, this does not mean that they would welcome such a development and *instances happening subsequent to the discharge of Frederick established that the Respondents earnestly desired that their employees not select a bargaining representative.*" (Emphasis ours.)

There was no evidence introduced whatsoever of any instances that happened after Frederick's discharge to

establish that the Respondent earnestly desired that their employees woud not elect a bargaining representative. In his Intermediate Report, the Trial Examiner states [R. 23] as follows:

> "Certain employees were told that the Company could not pay the union scale of wages and compete successfully in the marekt; others, that their earnings depended upon production, that the more they produced, the better their opportunity to secure wage increases. That the Respondents would view with disfavor anyone who actively, and perhaps with the appearance of success, was attempting to organize their employees, is completely believable."

As stated above, when the Chief Counsel rested his case, Respondent moved for a dismissal of the Complaint and the Trial Examiner, as shown in his report, dismissed all of the Complaint except that pertaining to Frederick and Clarence Leeper. This means that the allegations of Paragraph 6 of the Complaint above set forth were not proven by the Chief Counsel in his case and the same were dropped, and that Respondent did not have to put on proof to disprove such allegations. It seems that the Trial Examiner is hitting below the belt in his report because, having dismissed the Complaint with respect to Paragraph 6 and thereby lulling Respondent into a sense of security so that Respondent did not have to put on any evidence to disprove the allegations of said Paragraph 6, now the Trial Examiner uses some weak evidence put on by the Chief Counsel which he found insufficient at the trial to support Paragraph 6 of the Complaint, to try to show in his Intermediate Report that Respondent was anti-union.

There is nothing wrong for an employer to tell his employees that he cannot pay the union scale and that if they produce more they will be paid more. The conclusion that the Trial Examiner reached as set forth above, to the effect that Respondent would view with disfavor anyone who actively, and perhaps with the appearance of success, was attempting to organize its employees, is completely unsupported by the evidence and is entirely without the issues of the case, and highly prejudicial. It does show the state of mind of the Trial Examiner to be unfair and unsound and that his conclusions are entirely unreliable.

The Trial Examiner in his Report [R. 23] states that he was convinced that the Respondent was aware of union activities on the part of Frederick. He makes this statement despite the fact that there is no evidence to support it. Respondent does not claim that it did not know that the Union was attempting to organize its employees but the testimony on behalf of Respondent was not contradicted and clearly shows that Respondent did not know, as stated above, that Frederick was engaged in union activities until after his discharge.

The Board in its brief [R. 3] did not state fully what Frederick stated concerning being taken off of the carbon job. The brief merely states that Frederick protested being assigned to the work, whereas the evidence, as above set forth, shows that Frederick stated he would quit if not taken off this job. And the Board tries to give the impression that Frederick was taken off the job because Respondent's requirements increased so that a full-time employee was necessary for the work. As a matter of fact, Gilly wanted to lay Frederick off when

he said he would quit if not taken off the carbon work, because there was no other work Frederick could do, but Mr. Martin did not want to do so before Christmas. Respondent was hard pressed to find a job Frederick could do and put him at work on setting up machines and maintenance work, at which work Frederick did not prove satisfactory. The fact that he did not do this type of work properly occurred immediately at and prior to his discharge and was not related back many years, as the Board would lead one to believe. The Board (Br. p. 13), states that Respondent did not relish the prospect of having to deal with its employees through a collective bargaining agent, but the Board does not cite any evidence to this effect.

A review of the above evidence clearly shows that Frederick was discharged for cause and that he never requested to be reinstated. The Complaint, Paragraph 5 [R. 5] states that Respondent discharged Frederick on or about December 27, 1950, and at all times since said date has refused and failed to reemploy him. You cannot refuse to do an act until you have been so requested, and no evidence was introduced by the Chief Counsel showing or tending to show that Frederick had asked to be reinstated or that Respondent had refused to reinstate him.

Section 10(c) of the Act provides that no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Hence, the findings and conclusions of the Trial Examiner, concurred in by the Board, with reference to the back pay, are improper because Frederick was discharged

for cause and the Chief Counsel did not prove by a preponderance of evidence that Frederick was discharged because of union activities. In fact, the Chief Counsel tried to say that Frederick was discharged because of concerted activities, rather than union activities, yet the Trial Examiner tries to show that Frederick was discharged because he was handing out union authorization cards.

It is a common practice, and there are many decisions about it, that when an employer discharges an employee for cause and if such employee at such time should happen to be engaged in union activities, the first thing the union does is to run to the Board and shout discrimination.

Even under the Act before it was amended it was held time and again that an employer had the perfect right to discharge an employee for cause.[2]

The evidence produced by Respondent clearly shows that Frederick had not been properly performing his duties. He had become slow and slovenly; he had disobeyed orders; he had broken company property and tools. These are sufficient facts for discharge for cause. Assume for the sake of argument that both cause for

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[2]In the case of *Associated Press v. N. L. R. B.,* 301 U. S. 103, the court said:

> "The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the Act declares permissible."

discharge and participation in union activities on the part of Frederick existed, can the Trial Examiner merely say which motivated the minds of Respondent? Can he say that if cause for discharge had not existed that Respondent would have discharged Frederick anyway, or could he say Frederick had been discharged for cause even if the Trial Examiner felt that no union activities existed? If both cause for discharge and union activities exist at the same time, an employer is not required by the Act to continue to hire an employee because he may fear that charges will be filed against him. Here again comes the preponderance of evidence test which the Chief Counsel simply failed to meet.

In the case of *National Labor Relations Board v. Edinburg Citrus Assoc.*, 147 F. 2d 353, two employees were discharged on the grounds of disturbing other employees. These two employees were union organizers and the Board held that the discharge was an unfair labor practice because of discrimination in regard to hire or tenure, etc. This case was under the Act before the amendment. However, the court held in reversing the Board, as follows:

> "Other evidence of interference with organization seems to us insufficient. Most of it relates to objections to union discussions in work hours. It is well settled that an employer may so object. An outburst of impatience by Hyde on one occasion he promptly apologized for. We do not think there is substantial evidence of employer interference with self-organization. . . ."

Of course, under Section 8(c) of the Act as amended the employer now can express any views, arguments or

opinions and the same shall not constitute or be evidence of an unfair labor practice under any provisions of the Act if such expression contains no threat of reprisal or force or promise of benefit.

There is no evidence that Respondent with reference to Frederick or Leeper made any threat or reprisal or force or used any promise of benefit.

The Trial Examiner evidently tried to make his authority a pretext for interference with the right to discharge. When that right is exercised for other reasons than such intimidation and coercion, this neither he nor the Board is entitled to do.[3]

Frederick in his testimony tried to surmise that he was discharged because of his union activities although he admitted that these activities were carried on on the sly.[4]

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[3]*N. L. R. B. v. Jones & Laughlin S. Corp.,* 301 U. S. 1 (1936), 81 L. Ed. 893, at page 916.

Held:

> "The Act does not compel agreements between employers an employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine' . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation and on the other hand, *the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons* than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts." (Emphasis added.)

[4]*Burlington Dyeing & Finishing Co. v. N. L. R. B.,* 104 F. 2d 736 (4th Cir., 1939), at pp. 738-739.

The court held:

> "We next come to consider the discharge of the employees, W. J. Johnson, and H. C. Brooks. With regard to Johnson,

We could continue to cite case after case to substantiate Respondent's position.

With reference to Clarence Leeper, the testimony is undisputed that Leeper stated that if he did not receive

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a careful search of the record discloses no evidence that his discharge was brought about because of his union membership or union activities other than the surmise by Johnson himself. His was the only evidence on that point and that was only an opinion based upon no fact and unsupported by the testimony of any other witness. The Trial Examiner who heard the witnesses and saw their demeanor on the witness stand found to this effect. On the other hand, there was ample evidence, corroborated and uncontradicted, that there was good cause for Johnson's discharge. Johnson had been careless in his work and had been reprimanded because of it and immediately prior to his discharge he had damaged a large amount of cloth. He was admittedly guilty of infractions of the rules of the company.

"While it is true that courts cannot make their own appraisal of the evidence and that findings of the Board as to facts, if supported by evidence, shall be conclusive, yet if the findings of the Board are not supported by substantial evidence they will be reversed. *Appalachian Electric Power Co. v. National Labor Relations Board,* 4 Cir., 93 F. 2d 985; *National Labor Relations Board v. Columbian Enamelling & Stamping Co., Inc.,* 59 S. Ct. 501, 83 L. Ed. ....

"Here the Board, without any basis of fact that can be found in the evidence offered, reversed the findings of the Examiner as to Johnson and ordered his reinstatement and that he be paid in part. The reasons given by the Board for its conclusion are the admitted facts that the officers of the company were opposed to labor unions and that Johnson was a member of such a union. A conversation between Johnson and a foreman as to his reading a C. I. O. newspaper, also relied upon by the Board, is entirely too unsubstantial as a basis for a finding that he was discharged because of union membership. We are of the opinion that these facts alone are not sufficient to prove the petitioner company guilty of an unfair labor practice. The Board found it significant that no documentary evidence had been produced by the petitioner at the hearing showing that goods were damaged by Johnson, yet the Board refused the request of the petitioner to offer such additional evidence later on the ground that the hearing had been closed and that the petitioner had had an opportunity to produce such evidence without doing so. We are of the opinion that the attitude of the Board on this point was

certain night shift differential and pay for time not worked during his lunch period that he would quit. Is there anything in the law that says an employer must meet every wage demand and whim of an employee? An

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technical but, in view of our conclusion as to the discharge of Johnson, it is not necessary to decide whether the petitioner should have been allowed to produce additional evidence. In discharging Johnson the petitioner did not engage in any unfair labor practice."

Wilson & Co. v. N. L. R. B., 103 F. 2d 243 (C. C. A. 8th Cir., 4/12/39 Reh. den.).

Wilson & Co. operated a plant in which one of the departments was hog killing and cutting. The removal of the loin was called "loin pulling" which required skill so that the lean meat was not exposed. If exposed it was called "scoring." Wenzel was an expert loin puller and had been employed by the Company 18 years. He was a charter member of the Union involved and was president of the local.

On February 18, 1935, one of the customers of the Company complained of loin scoring and these complaints persisted. Jackson was the foreman over Wenzel and another employee, Torgerson, who were both loin pullers.

Jackson was anxious to retain his job and he discharged Wenzel and Torgerson.

The court in its opinion stated (p. 245):

"The position of the company as to the discharge was that he was discharged for bad workmanship resulting in losses to the company. The individual directly responsible for and who actually discharged Wenzel was Grover Jackson, immediate foreman over Wenzel. The issue here is whether there is substantial evidence that Wenzel was discharged because of his union activities. The direction of the evidence is such that this issue really takes the practical aspect of whether there is substantial evidence that he was not discharged for poor workmanship.

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"He took the matter up repeatedly with Wenzel and Torgerson, the loin pullers. Their work would improve temporarily and then slump back. Several of his higher officers made several checks of this loin pulling by inspecting the loins after they had passed from the pullers to the floor below. They found numerous instances of scoring. In June or July, Jackson made up his mind that the above two loin pullers, while capable of doing better work, would not do so. His repeated admonitions had resulted only in temporary improvements. To save his own job he determined to discharge the

employer still has the right to say what wages he will pay, and if an employee does not wish to work for the same, he can quit. We fortunately in the United States

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two loin pullers at that time. The plant manager and plant superintendent prevailed upon him not to do so but to make further efforts to rectify the situation. This he did, but the condition, he thought, was not remedied and, on August 17, 1935, he discharged both men. He did this without the knowledge of any of his superiors. The next day a committee of the Employee's Representation Plan urged the reinstatement of the two men upon the manager and the superintendent. These officials were agreeable to such reinstatement if Jackson would consent, since he was the one immediately involved and responsible for the work and the discipline of the men under him. A meeting was held that afternoon at which the manager, the superintendent, Jackson, Wenzel, and, possibly, members of the above committee were present. At that meeting the matter of re-employment of Wenzel and Torgerson was put up to Jackson, who refused to consent." (P. 249.)

The court held (p. 250):

"This trouble began in February, 1935. It reached its first crisis in June, when Jackson had determined to discharge the two loin pullers. If the company officials had desired to be rid of Wenzel because of his union activities it is strange that Jackson's superiors would have then prevailed upon him to retain Wenzel and Torgerson and give them another chance."

* * * * * * *

"It is very clear that the discharge of these men came from Jackson and Jackson alone. There is not one word of evidence of any animosity by Jackson toward Wenzel, personally, or toward the union, of which he was an officer, or that Jackson had any interest at all except in seeing that the work was done to the satisfaction of his superiors so that he (Jackson) could save his own job. It is significant, also, that both of these experienced loin pullers were discharged in the face of the fact that Jackson and everyone else connected with the matter understood that the company would suffer loss for several weeks during the training of men to take their places. We cannot find any evidence whatsoever, much less any substantial evidence, that the discharge of Wenzel was not solely for the reason that Jackson thought he was not doing the work as it should be done and that he would not do it as it should be done—in short, for good cause. Our conclusion is that the determination of the Board as to the discharge of Wenzel is not sustained."

still have a free labor market. If a man does not like his job, he can quit. If he does not do his job properly, he can be discharged. What would the Trial Examiner expect Respondent to do in the case of Leeper? Fred Nemec testified that he told Leeper he would look into the matter, but that did not satisfy Leeper and so he delivered an ultimatum. Respondent refused to concede to his demands and so he quit. He later asked to be rehired but there is no law that says that Respondent had to rehire him. There is absolutely no evidence that he was discharged for any union activities. If employees tell the employer that if they do not get a wage increase that they will walk out, and if employer refuses to grant such a wage increase, it is not an unfair labor practice. Such things happen every day.

The Trial Examiner in his report [R. 18] states that under the evidence it cannot be doubted that Leeper was discharged. The evidence was clear that Leeper quit and said he was quitting. There is no evidence that Respondent discharged him at all. Respondent, believing that he had quit, made out his pay check and attempted to deliver it to him at his home so that he would not have to be inconvenienced by going back to the plant for it.

The Trial Examiner states [R. 19-20] as follows:

> "Now Nemec may certainly be pardoned for being disturbed by the conduct of Leeper and may well have wished that the welders would seek to deal with him individually rather than as a group but

> when he refused longer to employ Leeper because of his leadership in the action he was violating a right secured to Leeper by the Act."

This is a very odd statement for the Trial Examiner to make. He assumes that Nemec should be pardoned. This, of course, is perfectly ridiculous. There is nothing in the evidence to even tend to show that Nemec wanted to deal with the welders individually, but, on the contrary, the evidence shows that Respondent was always willing to discuss any matters with its employees. Leeper quit and the Trial Examiner cannot say fairly that Respondent refused longer to employ Leeper because of his leadership in the action.

The undisputed evidence is that Leeper was opposed to the Union [R. 72, 167]. It is ridiculous to say that an employer would discharge and refuse to rehire an anti-union employee for union organizational activties.

The Board in its brief (p. 18) even tries to change the testimony, which was that Leeper said he would quit, the Board stating that, "in the context, obviously meant 'strike'." There is absolutely no evidence that Leeper said that if his demands were not met he would strike.

The Rule of Preponderance of Evidence.

Under the original National Labor Relations Act, review of the Board's Findings of Fact was restricted to a consideration of whether or not there was substantial evidence in support of the particular findings. The original Act itself required in Sections 10(e) and (f) that the findings

be supported only by "evidence," but the Supreme Court held that "evidence" as used in the original Act meant "substantial evidence." In *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, the Court stated:

> ". . . Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ."

The 1947 amendments to the Act expanded the scope of judicial review, especially review of the evidence. The new amendments establish in effect a "preponderance of evidence" test with respect to conclusions of law by the Board.

Hence, if under the original Act the court did require substantial evidence, now due to the Act of Congress,[5]

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[5]The Conference Committee Report of Congress with reference to the 1947 amendments, correlates the changes regarding evidence made in Sections 10(b), (c), (e), and (f), as follows:

> "Under the language of Section 10(e) of the present Act, findings of the Board upon court review of Board orders are conclusive 'if supported by evidence.' By reason of this language the courts have, as one has put it, in effect 'abdicated' to the Board (citing cases). In many instances deference on the part of the courts to specialized knowledge that is supposed to inhere in administrative agencies has led the courts to acquiesce in decisions of the Board, even when the findings concerned mixed issues of law and of fact (citing cases), or when they rested only on *inferences* that were not in turn supported by the facts in the record (citing cases).
>
> "*As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, presumed expertness on the part of Board in its field can no longer be a factor in the Board's decisions.* While the Administrative Procedure Act is generally regarded as having intended to require the courts to examine decisions of administrative agencies far more critically than has been their

the courts must require that there be a preponderance of evidence.

Section 10(c) as originally enacted, provided as follows:

> "If upon *all* the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice, . . ."

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practice in the past, by reason of a conflict of opinion as to whether it actually does so, a conflict that the courts have not resolved, there was included both in the House bill and the Senate amendment, language making it clear that the act gives to the courts a real power of review.

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"*The language also precludes the substitution of expertness for evidence in making decisions.* It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B. v. Nevada Consol. Copper Corp.* (316 U. S. 105 (5 Labor Cases, Par. 51,140)) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation, and Le Tourneau, etc., cases, *supra,* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into Section 10(e) of the amended act."—Conference Report, House Report 510, 80th Cong., pp. 55-56. (Emphasis added.)

* * * * * * *

The Conference Report with respect to the preponderance of evidence test, states as follows:

> "*Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom, where it would not meet that test otherwise.* Again the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence setting forth the reasons for believing this evidence and disbelieving that, for according greater weight to this testimony than to that, for drawing this inference rather than that. *Immeasurably increased respect for decisions of the Board should result from this provision.*"—Conference Report, House Report 510, 80th Cong., pp. 53-54.

As amended in 1947, Section 10(c) provides that orders shall issue:

> "If upon the *preponderance of the testimony* taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice . . ." (Emphasis added.)

In the case of *N. L. R. B. v. Sandy Hill Iron & Brass Works* (2d Cir.), 13 Labor Cases, 64098, the Court held that the provisions in the 1947 amended Act requiring that the existence of unfair labor practices must be established by a preponderance of the evidence, precludes the Board from basing findings solely on its "expert" judgment.

This Court held, in *N. L. R. B. v. San Diego Gas & Electric Co., supra,* that under the requirements of the Labor-Management Act of 1947 "appellate courts are required to take a 'new look' in determining whether *substantial evidence exists to support a finding. It is no longer sufficient if some substantial evidence exists.* Such evidence must withstand scrutiny with an eye focused on its relation to all the evidence in the record."[6]

---

[6]The essence of Mr. Justice Frankfurter's opinion in *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, and to this extent concurred in by all the other Justices, is that the Administrative Procedure Act and the Taft-Hartley Act direct that reviewing courts must now assume more responsibility for the reasonableness and fairness of decisions of the National Labor Relations Board than some courts have shown in the past. In particular, it was held that, in determining whether an order of the Board is supported by substantial evidence, the court should take into account whatever in the record fairly detracts from the weight of the evidence, and that the court is precluded from sustaining an order merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Employers are still free to discharge, lay off, demote or refuse to reinstate an employee when they are not motivated by a desire to inhibit free unionization. Before it can be held that a violation has occurred, a preponderance of the evidence must show that the discharge or other disciplinary measure was motivated by anti-union consideration. If this burden of proof is not sustained, the Board may not hold that a violation of the Act has occurred. The employer is free to discharge or otherwise discipline his employees, it has been said, for a good cause, a bad cause, or no cause at all, so long as he is not primarily motivated by anti-union considerations.

Prior to the amendment of the Act in 1947, the question of motivation has been indirectly approached by the Board and, among the facts and circumstances which the Board has considered indicative of the presence of discriminating motivation, are the following: (1) Violent anti-union background of the employer, evidenced by past history of interference, restraint and coercion; (2) threat of disciplinary action or shutdowns if unionization develops; (3) surveillance of unionizing activities prior to discharge; (4) expressed satisfaction with the work of employees later discharged; and (5) absence of any other good cause for the discharge and preference of one of the foregoing factors.

Under the preponderance of evidence test, the courts will certainly hold that the Board can no longer make assumptions as above, but must have absolute direct evidence upon which to establish such facts.

However, in the instant case there is no evidence at all showing any anti-union background of Respondent,

although the Trial Examiner tries to make an unwarranted inference to that effect. [Intermediate Report, R. 26.]

The Trial Examiner evidently tried to use his "expert" judgment, forgetting that such a thing was no longer possible. A reading of the evidence plainly shows that the Chief Counsel did not prove by a preponderance of the evidence either the allegations of the complaint or the charges as filed. In the Intermediate Report, for example, the Trial Examiner states [R. 18]: "I think that it may not be doubted under the evidence that Leeper was discharged. True enough, he had issued what might be termed an ultimatum to the Respondents and had stated that he would quit if they did not meet his conditions."

The finding of the Trial Examiner that Leeper was discharged is not supported by a scintilla of evidence. The Trial Examiner, as above quoted, admits that Leeper stated that he would quit, and yet he holds that Leeper was discharged.

Board's Decision and Order.

The Court's attention is called to the Findings of Fact of the Trial Examiner, concurred in by the Board [R. 25] in which the Examiner recommends that Respondent offer Frederick full reinstatement and make him whole for any loss of pay by payment to him of a sum of money equal to what he normally would have earned as wages from the date of his discharge, December 28, 1950, to the date of Respondent's offer of reinstatement, less Frederick's earnings during that period. This recommendation is not quite clear. Frederick worked as a part-time employee of Respondent and averaged about 30 hours per week (*supra*). At the time of his discharge it was

during school holidays and he was working full time. His normal wages would be on the basis of 30 hours per week and not on the basis of full time, and it is Respondent's understanding that in calculating Frederick's normal earnings, the Trial Examiner meant the amount he would receive on the basis of his part-time work week.

Conclusions of Law must be based upon proper Findings of Fact and also upon the charges as filed. Inasmuch as the Trial Examiner's Findings of Fact, or at least what he states the facts were in his Intermediate Report, are not supported by the evidence, and are contrary thereto, it must follow that the Trial Examiner's Conclusions of Law are erroneous. A reading also of the Conclusions of Law and recommendations plainly shows that the same are based upon charges which even the Trial Examiner dismissed during the hearing.

Looking at the recommendations [Intermediate Report, R. 27] in view of the charges as filed and those dismissed by the Trial Examiner at the hearing, what basis is there for the recommendations that Respondent cease and desist from discouraging activities among its employees with respect to the union, etc., and in any manner interfering with the exercise of the right of its employees to self-organization, etc.?

Assuming the Complaint had not been at variance with the charges, the only two points in the case that were left after the granting of Respondent's motion to dismiss as above set forth were simply the questions of whether or not Frederick was discharged for cause or for engaging in union activities, and whether or not Leeper quit. What has this to do with the activities of other employees of Respondent?

Why should Respondent be compelled to post any notice as recommended on page 8 of the Intermediate Report? Why should Respondent be required to pay back-pay to Leeper when he quit, or to pay back-pay to Frederick when he was discharged for cause?

Since the Board's Decision and Order are based solely on the Trial Examiner's Conclusions of Law and Recommendations, it follows that since the Trial Examiner was in error as aforesaid, the Board's Decision and Order are also erroneous.

Conclusion.

For the reasons stated, the Court should set aside the Order of the Board, dismiss the Complaint, and refuse to grant an order to enforce the Board's Order.

Dated this 24th day of July, 1953, at Los Angeles, California.

Respectfully submitted,

R. D. SWEENEY and
J. E. SIMPSON,

By J. E. SIMPSON,

Attorneys for Respondent.

APPENDIX.

In the case of *Joanna Cotton Mills Co.* (*supra*), the Court stated:

"The case originated on a charge filed with the Board by an A. F. of L. Union in 1947 alleging that the company had engaged in various antiunion activities and had discharged Blakely because of his membership in and activities on behalf of the union. An amended charge was filed on February 13, 1948, adding to the original charge an allegation that the company had discharged Blakely because he had engaged with other employees 'in concerted activities for the purpose of collective bargaining and for other mutual aid and protection;' but a copy of this amended charge was not mailed to the company until February 26, 1948, more than six months after the Labor-Management Relations Act of 1947, 61 Stat. 146, 29 USCA 160, had become effective. The Board found that the company had not been guilty of the antiunion activities alleged and had not discharged Blakely because of union membership or activties but had discharged him because of engaging in other concerted activities which were held to be embraced within the amended charge. Two members of the Board, including the chairman, dissented from the holding on the amended charge. The company contends: (1) that the finding that Blakely was discharged for engaging in concerted activities is not sustained by substantial evidence, (2) that what is relied upon to support the charge does not fall within the meaning of concerted activities as those words

are used in the statute; and (3) that the amended charge is barred by limitations because not served upon the company within six months after the passage of the Labor-Management Relations Act."

The Court held (p. 754):

"And we think, also, that the charge is barred by limitations. Section 10(b) of the Labor Management Relations Act, 29 U. S C. A. §160(b), specifically provides that 'no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.' We agree that the six months, as applied to the charge here, runs from the date when the statute became effective. See The Fred R. Smartly, Jr., 4 Cir., 108 F. 2d 603, 607. *The trouble, however, is that no charge relating to discharge for engaging in concerted activities, as distinguished from union activities, was served upon the company until more than six months had elapsed after the act had become effective.*

"The answer of the Board is that the charge served more than six months after the effective date of the act was an amended charge and that the original charge was filed and served in time. The trouble with this is that the original charge was not one which could have been sustained by proof of discharge on account of Blakely's activities in connection with the petition. It was one relating solely to antiunion activities and the discharge of Blakely on account of union membership and activities in behalf of the union, a charge of which the Board found that the company was not guilty. *The amended charge,*

which was expressly filed as a substitute, *alleged for the first time that the discharge was because Blakely had engaged in 'concerted activities' other than in connection with his union membership, and thus brought into the case a new and entirely different charge of unfair labor practice from that contained in the original charge.*

"The Board argues that it was the discharge of Blakely that was charged as an unfair labor practice in both charges; but *the mere discharge of an employee is not an unfair labor practice.* To discharge him because of union membership or activity is, of course, an unfair labor practice; to discharge him because of originating and presenting a petition for the discharge of a foreman, if an unfair labor practice, is one of an entirely different character. The case seems clearly one for the application of the rule recently announced by the Supreme Court that 'a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.' *United States v. Andrews,* 302 U. S. 517, 524, 58 S. Ct. 315, 82 L. Ed. 398; *United States v. Garbutt Oil Co.,* 302 U. S. 528, 58 S. Ct. 320, 82 L. Ed. 405. Not until more than six months after the effective date of the Labor-Management Relations Act was any charge served upon the company upon which the finding of guilt made by the Board could have been based; *and it was then too late for the charge to be made.*

"For the reasons stated, the order of the Board will be set aside.

"Reversed."

The following cases are cited by the Board in its brief with reference to Respondent's assertion that neither the Board nor this Court has jurisdiction of this matter for the reason that the Complaint was issued more than six months after the alleged unfair labor practices allegedly occurred. The cases thus cited are distinguishable and Respondent submits do not support the Board's position.

Cusano v. N. L. R. B., 190 F. 2d 898 (C. A. 3).

In this case the amended charge, which was filed more than six months after the alleged unfair labor practice, did not abandon the original charge but only added to it, and the court held that the allegation in the amended charge was, at most, a slight change in legal theory.

In the case of *N. L. R. B. v. Kingston Cake Company,* 191 F. 2d 563 (C. A. 3), cited by the Board in its brief on page 23, the charge was filed by the employee and the court said that the charge puts company on notice that employee challenges its basis for dismissing him and that there was a legally sufficient relationship between the subject matter of the charge and the allegations of the complaint. The six months' period of limitations was not involved in this case.

In the instant case the Charge was filed by the Union against the Respondent, and not by the employee.

The Board in its brief (p. 26), cites the case of *N. L. R. B. v. Bradley Washfountain Co.,* 192 F. 2d 144, with respect to the doctrine of "relating back." The question of the six months' limitation is not involved in this case and it would appear that the complaint was filed within six months after the occurrence of the alleged

unfair labor practices. The court held (p. 149) as follows:

"Accordingly, we are of the opinion that the Board improperly grounded its conclusion as to the increases made in June and October and as to the concession concerning holidays made in July upon a charge not contained in the complaint as contended by respondent."

The court held that it was not significant that the complaint was broader than the original charge but the court did not state that the complaint contained a new or additional charge, as in the instant case.

The Board in its brief (p. 27) cites the decision of this Court in the case of *Katz et al. v. N. L. R. B.*, 196 F. 2d 411 (C. A. 9), in support of its contentions. In that case all that this Court held was that the charge was sufficient to support the allegations of the complaint and that it was not too general.

With respect to the six months' period of limitation, the Court stated (p. 415):

"While, as we shall shortly show, the mere execution of the agreement on December 17, 1948, constituted an unfair labor practice, there is no doubt but that the continuous enforcement of the agreement thereafter within the six months period prior to the filing of the charge, was an unfair labor practice, and with respect to this continued and continuous enforcement of the illegal union shop agreement, the prosecution of the proceeding was not barred by limitations."

In the case of *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, decided in 1939, cited in the Board's brief (p. 25), the Court did not hold contrary to the conten-

tions of the Respondent herein. That case was decided prior to the six months' limitation as now found in the amended Act. In that case the petitioner contended that the charge is a jurisdictional prerequisite to the complaint and subsequent proceedings and that they are restricted to the specific unfair labor practices alleged in the charge. The Court held that the complaint only elaborated the charge with particularity and stated that the violations alleged in the complaint were but a prolongation of the attempt to form a company union and *"all are of the same class of violations as those set up in the charges and were continuations of the same objects."* (Emphasis added.) And the Court then held that it was unnecessary for it to consider how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it.

The Board in its brief (p. 27), cites the case of *Kansas Mill Co. v. N. L. R. B.,* 185 F. 2d 413 (C. A. 10), as additional authority for the doctrine of "relating back." In this case the court did not hold that the amended charges stated a new and different charge of unfair labor practice. The court stated:

"The second amended charge merely alleged in particular acts constituting unfair labor practices under Section 7 of the Act. There is nothing inconsistent in the first or second amended charge with the general allegations of the original charge. They are somewhat in the nature of a bill of particulars, making more definite the general allegations of the original charge, and thus relate back to the original charge."

N. L. R. B. v. Gaynor News Co., 197 F. 2d 719 (certiorari granted, 345 U. S. 902).

Board in its brief (p. 27), cites this case as authority to authorize inclusion within the complaint of amended charges filed after the six months' limitation period, upon the doctrine of "relating back." It will be noted, however, in this case that the amended complaint did not add any new or different charges of unfair labor practice. The court stated, at page 721:

"We feel that the enlarged complaint can be justified here on the 'relating back' theory in so far as the additional victims of the discriminatory treatment are concerned. Here the violation and the facts constituting it remained the same as in the original charge; only the number of those discriminated against was altered. This addition certainly could not prejudice the employer's preparation of his case, or mislead him as to what exactly he was being charged with. (Citing cases.) The same is true of the additional allegation in the final complaint that action previously categorized as a violation of §§8(a)(1) and (3) constituted also a violation of §8(a)(2). This was a change in legal theory only, and not in the nature of the offense charged. (Citing cases.) As to the charge of illegality concerning the 1948 contract, we agree that, so long as that contract continued in force, if actually illegal, a continuing offense was being committed by the employer. Since the contract was still in force at the time of filing, the six months' limitation period of §10(b) had not even begun to operate. (Citing cases.) The complaint was, then, in all respects valid."

In the case of *N. L. R. B. v. Dinion Coil Co.*, 201 F. 2d 484 (C. A. 2), cited by the Board in its brief (p. 26),

the court permitted the complaint to be amended to add the names of two more employees whose discharge occurred about seven months before the filing of the amendment. It will be noted in this case that the complaint was not amended to add a new and different charge of unfair labor practice.

In the case of *Stokely Foods v. N. L. R. B.*, 193 F. 2d 736, cited by the Board in its brief (in Footnote 22, p. 24), it appears from the decision that the charges were filed within six months after the occurrence thereof and that the complaint did not add a new or different charge as in the instant case, but alleged with more particularity the violations set forth in the charges.

In the case of *N. L. R. B. v. Cathey Lumber Co.,* 185 F. 2d 1021 (Board's Br. pp. 24, 26), the Circuit Court, in 189 F. 2d 428, granted a rehearing setting aside its prior judgment and the order of the court and dismissed the complaint, because of the failure of the union to comply with Section 9(h) of the Act.

In the case of *N. L. R. B. v. Kobritz,* 193 F. 2d 8, cited in Board's brief (p. 26), it appears from the decision that an original and three amended charges were filed within the six months' period but that the complaint contained no specific allegations with reference to the second charge and the complaint was amended to include the second charge. The court held that the filing of the third amended charge did not constitute a withdrawal of the second amended charge and therefore did not preclude the Board from predicating a complaint upon the second amended charge.

Said case is not in point with the instant case.

No. 13692

United States Court of Appeals
for the Ninth Circuit.

DAVID DON SCHUMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED

MAY 21 1953

PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-15-53

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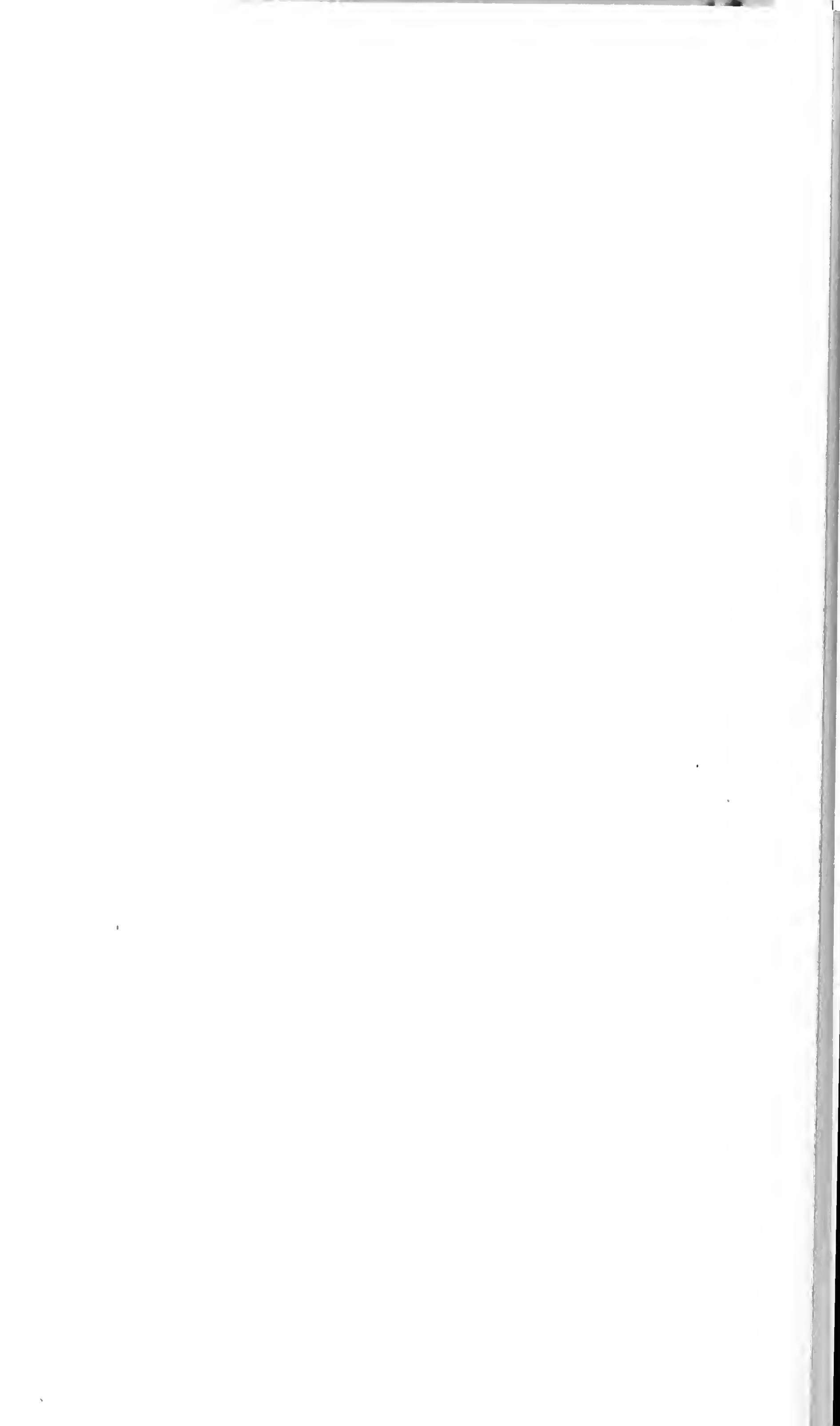

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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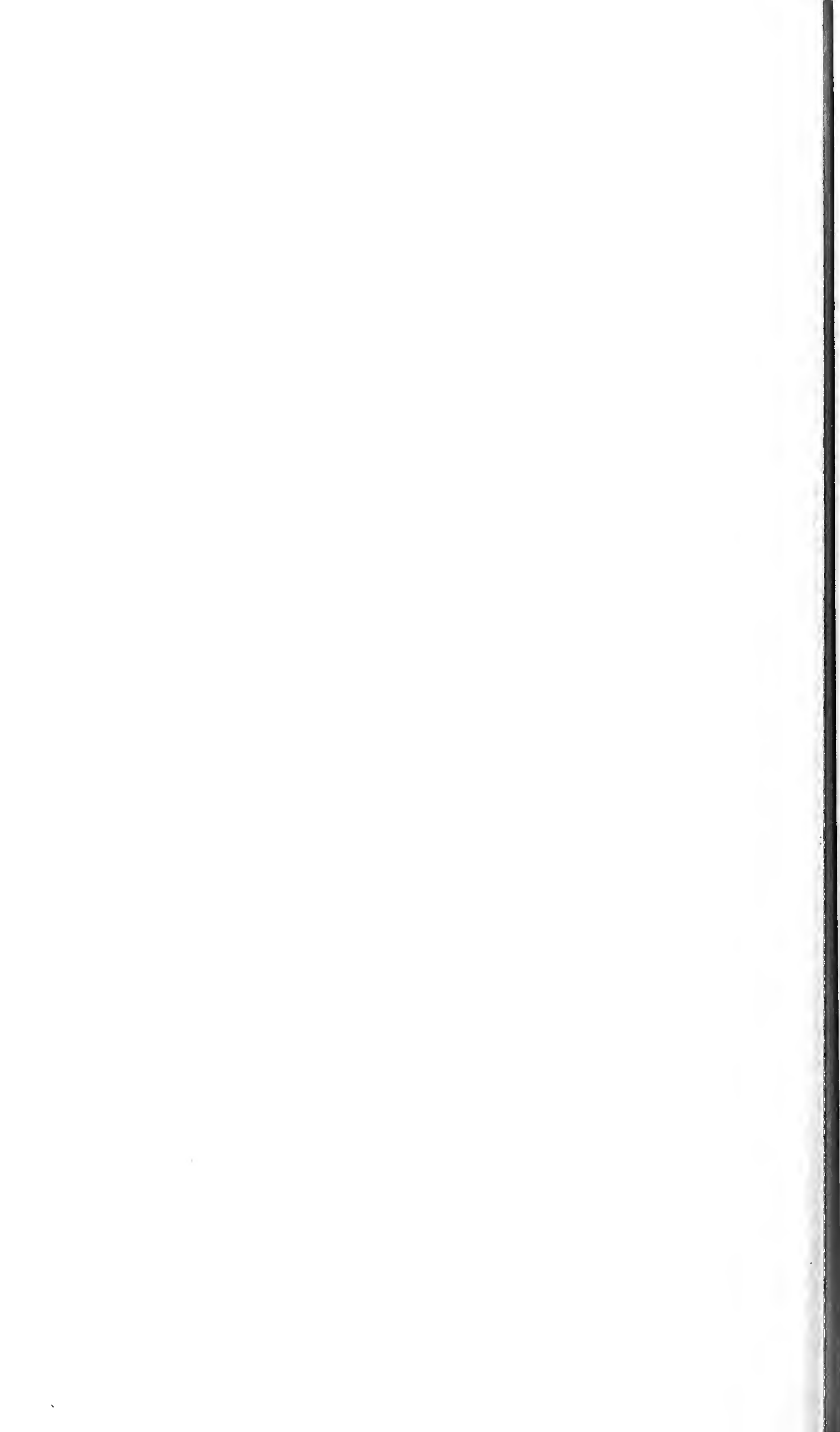

In the United States District Court for the Northern District of California, Southern Division

No. 33332

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID DON SCHUMAN,

Defendant.

INDICTMENT

(Violation: Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a).) Refusal to Submit to and Be Inducted Into the Armed Forces.

The Grand Jury Charges: That

David Don Schuman, defendant herein, being a male citizen, of the age of 22 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948," as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 38 of the Selective Service System in the City and

County of San Francisco, State of California, which said Local Board No. 38 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A, and having theretofore been duly ordered by his said Local Board No. 38 to report at San Francisco, California, on the 28th day of August, 1952, for induction into the Armed Forces of the United States, and having so reported, did then and there knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill.

/s/ JAMES C. DORWELL,
Foreman.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Approved as to Form:
/s/ J. K.

Penalty: Imprisonment not to exceed 5 years, or Fine not to exceed $10,000.00, or both.

Bail, $2,000.

/s/ MICHAEL J. ROCHE.

[Endorsed]: Filed September 4, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 10, 1952

Present: The Honorable Michael J. Roche,
District Judge.

This case came on regularly for arraignment. Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States. Gerald Kilday, Esq., was present on behalf of the defendant. The defendant was handed a copy of the indictment, waived reading thereof, stated his true name to be as charged, and was thereupon duly arraigned upon the indictment.

A motion on behalf of the defendant for reduction of bail from $2,000.00 to $1,000.00 was ordered granted, and defendant's application for permission to leave the jurisdiction of the Court was likewise granted.

The Court ordered that this case be continued to September 24, 1952, at 9:30 a.m. for the entry of plea.

[Title of District Court and Cause.]

MINUTES OF THE COURT—SEPT. 24, 1952

Present: The Honorable Michael J. Roche,
District Judge.

The defendant, with his attorney, Gerald Kilday, Esq., was present in Court. Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant pleaded Not Guilty to the indictment and waived trial by jury, which written waiver was approved by the United States and the Court.

This case was ordered continued to October 17, 1952, at 9:30 a.m. for trial.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above-entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, Sept. 24, 1952.

/s/ DAVID DON SCHUMAN,
Defendant.

/s/ J. H. BRILL,
Attorney for Defendant.

/s/ JOSEPH KARESH,
Assistant United States Attorney.

Approved:

/s/ MICHAEL J. ROCHE,
Judge.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 17, 1952

Present: The Honorable Monroe M. Friedman,
District Judge.

This case came on regularly this day for trial by Court, sitting without a jury.

Joseph Karesh, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant was present with his attorney, John Brill, Esq.

Mr. Karesh and Mr. Brill made their respective opening statements to the Court.

William G. Harry was sworn and testified on behalf of the United States.

Mr. Karesh introduced in evidence certain exhibits which were filed and marked U. S. Exhibits Nos. 1 to 32, inclusive. The Government thereupon rested.

Mr. Brill made a motion for a judgment of acquittal, at the close of plaintiff's case, which motion was argued upon the close of the defendant's case and ordered submitted.

Mr. Brill made a motion for production of certain documents, and due consideration having been had thereon, it is Ordered that said motion be denied.

Mr. Karesh made a motion to quash a subpoena, heretofore filed in open Court, as to Chauncey Tramutolo, which motion was ordered granted.

Mr. Brill moved to withdraw a certain other subpoena, having been improperly filed, which motion

was ordered granted. By stipulation of counsel, Mr. Tramutolo was excused.

Joseph Bonzani and Mathew Dooley were sworn and testified on behalf of defendant.

The hour of adjournment having arrived, the Court ordered this case under submission and continued it until October 21, 1952, for decision. Ordered that the defendant be permitted to remain at large on bail.

[Title of District Court and Cause.]

MINUTES OF THE COURT—OCT. 24, 1952

Present: The Honorable Monroe M. Friedman, District Judge.

The parties hereto being present as heretofore, and the defendant being present in proper person, this case came on regularly this day for further hearing on the Court's own motion.

Joseph Bonzani being called on the Court's own motion, having been sworn, testified for the information of the Court.

Both parties having been heard, and after due consideration, the Court adjudged the defendant Guilty as charged, and ordered that this case be referred to the Probation Officer for pre-sentence investigation and report. Ordered case continued to November 7, 1952, at 9:30 a.m. for hearing on report of Probation Officer and for sentence.

[Title of District Court and Cause.]

MINUTES OF THE COURT—NOV. 7, 1952

Present: The Honorable Monroe M. Friedman,
District Judge.

The parties hereto, and the defendant being present in proper person, this case came on regularly this day for sentence.

After hearing the respective counsel, and the defendant personally as to whether or not said defendant would consider entering the Armed Forces in a non-combatant capacity, and having been advised that defendant would not so enter in such capacity, It Is Ordered that said defendant David Don Schuman be, and he is hereby, sentenced to be imprisoned for a period of Eighteen (18) Months in an institution to be designated by the U. S. Attorney General. Ordered that judgment be entered herein accordingly.

Attorney for defendant gave Notice of Appeal and made a motion that defendant be permitted to remain at large on bail pending appeal. Ordered case continued to November 13, 1952, at 9:30 a.m. for further hearing. Ordered that defendant remain on his present bail.

United States District Court for the Northern District of California, Southern Division

No. 33332

UNITED STATES OF AMERICA,

vs.

DAVID DON SCHUMAN.

JUDGMENT AND COMMITMENT

On this 7th day of November, 1952, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a)—(Defendant, David Don Schuman did, on August 28, 1952, at San Francisco, Calif., knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States), as charged in the Indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or

his authorized representative for imprisonment for a period of Eighteen (18) Months.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ MONROE M. FRIEDMAN,
United States District Judge.

Examined by:

/s/ JOSEPH KARESH,
Assistant U. S. Attorney.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.

By /s/ A. B. DIEPENBURGH,
Deputy Clerk.

M. E.

[Endorsed]: Filed and entered November 7, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: David Don Schuman, 44 Aztec, San Francisco, California.

Name and address of appellant's attorney: J. H. Brill, 1020 Mills Building, 220 Montgomery Street, San Francisco 4, California.

Offense: Violation of Selective Service Training Act.

Concise statement of judgment and sentence rendered November 7, 1952, is that the defendant be committed to the custody of the Attorney General for a period of eighteen (18) months. Stay of execution granted to Thursday, November 13, 1952.

I, the above-named appellant, by my attorney, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: November 12, 1952.

/s/ J. H. BRILL,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 12, 1952.

[Title of District Court and Cause.]

ORDER FOR RELEASE ON BAIL PENDING APPEAL

Whereas, on the 7th day of November, 1952, at a term of the United States District Court in and for the Northern District of California, Southern Division, in a proceeding in said Court entitled as above, and wherein David Don Schuman was convicted as charged in the indictment of violating Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a), and

Whereas, on said 7th day of November, 1952, judgment and sentence was made, given, rendered and entered against said David Don Schuman by

said Court, who was by said judgment sentenced as follows: Committed to the custody of the Attorney General, to be imprisoned for a term of eighteen (18) months in such federal institution as shall be designated by said Attorney General, and

Whereas, thereafter, on said 7th day of November, 1952, the Court was advised by the defendant that an appeal would be prosecuted in good faith and would not be taken frivolously or for the purpose of delay, and

Whereas, on said 7th day of November, 1952, a motion for defendant's release on bail pending determination of said appeal was made by said defendant, on the ground that the case involved substantial questions of law which should be determined by the Appellate Court, and

Whereas, said motion for bail was continued to November 13, 1952, for further hearing, and

Whereas, it appearing to this Court that a notice of appeal was filed by defendant, and it further appearing to this Court that this case involves the following substantial questions of law:

(a) Whether or not there was a basis in fact for the classification given defendant, and

(b) Whether or not the constitutional rights of the defendant have been violated in the refusal of the Court and the Attorney General to permit the F. B. I. reports used by the Hearing Officer of the Department of Justice to be introduced in evidence, or used by the defendant to ascertain the names of the informants and to permit defendant to cross-examine such informants;

and it further appearing to this Court that said appeal is and will be prosecuted in good faith;

Now, Therefore, it is hereby ordered that defendant be released on bail in the sum of One Thousand and no/100 Dollars ($1,000.00), cash, in the form and upon the conditions as required by law, pending the appeal in the above-entitled cause, to be approved by the District Court in and for the Northern District of California, Southern Division, and filed with the clerk of that Court.

Dated: November 14, 1952.

/s/ MONROE M. FRIEDMAN,
United States District Judge.

Nov. 14, 1952, approved as to form.

/s/ JOSEPH KARESH,
Asst. United States Attorney.

[Endorsed]: Filed November 17, 1952.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING RECORD ON APPEAL

Upon hearing of the motion made ex parte and good cause therefor appearing, It Is Hereby Ordered that the time within which to file and docket the record on appeal in the above-entitled

case is hereby extended to and including the 22nd day of January, 1953.

Dated: December 16th, 1952.

/s/ MONROE M. FRIEDMAN,
Judge of the District Court.

Approved as to form:

CHAUNCEY TRAMUTOLO,
United States Attorney.

By /s/ JOSEPH KARESH,
Assistant United States Attorney.

[Endorsed]: Filed December 16, 1952.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33332

Before: Hon. Monroe M. Friedman, Judge.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID DON SCHUMAN,
Defendant.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:
JOSEPH KARESH, ESQ.

For the Defendant:
JOHN H. BRILL, ESQ.

Friday, October 17, 1952

The Clerk: United States vs. David Don Schuman, for trial.

Mr. Brill: Ready.

Mr. Karesh: Ready.

The Clerk: Would respective counsel please state their names for the record?

Mr. Karesh: Joseph Karesh, Assistant United States Attorney, appearing for the Plaintiff, the United States.

Mr. Brill: John H. Brill, appearing for the Defendant.

The Court: Do you want to make an opening statement, Mr. Karesh?

Mr. Karesh: The indictment charges the defendant with a violation of the Universal Military Training Service Act.

The Government will show that David Don Schuman is a male citizen of the United States of the age of 22; that he registered for selective service, and he was assigned through error to Local Board Number 40, his true Board being Board 38; was thereafter properly assigned to Board 38. He was ultimately classified after appeal in Class 1-A, was ordered to report for induction into the Armed Forces, did report at San Francisco on the 28th day of August, 1952, and then and there did knowingly refuse to submit himself to being inducted into the armed forces of the United States.

The Court: Do you want to make an opening statement?

Mr. Brill: I don't believe so at this time, your Honor. [2*]

There is no question but that the classification indicated by the United States Attorney is the one that was ultimately given him. There is no question but that he refused to accept induction into the armed forces. He reported for induction, however, but refused to make the step forward and accept induction, and this indictment resulted.

Mr. Karesh: Will the clerk come forward, please.

May it please your Honor, counsel has stipulated that, without calling the clerk, we may offer the entire contents of the selective service file in evidence on behalf of the United States. I have furnished him with photostats of the file. There may be certain documents like physical examination reports that might stay out. We will begin to offer them. I have given you photostats.

Mr. Brill: That is correct. It will be stipulated for the record that all of the files and records produced by the draft board may be offered in evidence without objection in this manner.

The Court: Well, you are about to offer certain documents in evidence?

Mr. Karesh: Yes.

The Court: Are you going to offer them one at a time?

Mr. Karesh: Yes, because they would have to be read, I presume.

The Court: If you have any objections, raise

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

them as you [3] go along. If I do not hear from you, I will understand that you raised no objections to the introduction of the particular document in evidence.

Mr. Brill: As I understand it, the entire file is to be offered in evidence, together with all of the exhibits and documents presented by the registrant himself, is that correct?

Mr. Karesh: Yes. Your Honor, in the interest of time, certain documents being lengthy, we will submit them to your Honor. Your Honor can read them, and their contents can be deemed read into the record. Counsel has a photostatic copy of the file.

The Court: Is that satisfactory?

Mr. Brill: Fine; so stipulated.

The Court: You offer them in evidence?

Mr. Karesh: Yes, offer the file in evidence. As I do, it can be numbered 1, 2, 3, as they go into evidence because there may be certain documents which we will not offer.

The Court: All right.

Mr. Karesh: As U. S. Exhibit 1, we offer the registration card of David Don Schuman, SSS Form No. 1, in evidence.

The card indicates he registered September 17, 1940, in San Francisco; that he was assigned to Board 40; ultimately the board was changed and the card reflects the correct board, Board 38. His address was 3009 Mission Street, San Francisco. His occupation was student. He gives his mother's name as [4] Mrs. Memi E. Schuman; his date of

birth August 15, 1930; place of birth Seattle, Washington. He had never served in the armed forces and he had no membership in a reserve component or no active duty in the armed forces of the United States at any time.

The Clerk: United States Exhibit Number 1 in evidence.

(Thereupon the registration card marked United States Exhibit Number 1 in evidence.)

Mr. Karesh: As U. S. Exhibit next in order we would offer the Selective Service Questionnaire of David Don Schuman, SSS Form 100, filed with the Local Board, September 1, 1949, having been mailed to him August 25, 1949.

There is the identification of the registrant, his name and address. He has no social security number. That is Series 1.

Series 2 "Present members of armed forces" is left blank.

Series 3 "Prior military service" is blank.

Series 4 "Officials deferred by law" is left blank with the exception of the word "None" written in.

Series 5 "Sole surviving son."

"I am not the sole surviving son of a family of which one or more sons or daughters were killed in action or died while serving in the armed forces of the United States or subsequently died as a result of injuries received or disease incurred from such service." [5]

Series 6, "I am not a minister of religion. I do not regularly serve as a minister." And the rest

of it is left blank; particularly with relation to the point about students preparing for the ministry, that is left blank.

"Family Status." "I have never been married."

"Occupation." "If this box is checked, complete Series XI" and he checked the box but Series XI was not completed.

The "Agricultural Occupation" is not filled out.

His education: Six years of elementary school, three years of junior high school, and three years of high school, did not graduate from high school. He has had other schooling at San Francisco State College, biology; length of time attended six weeks.

"Student. I am a full time student at City College of San Francisco located at San Francisco, majoring in Pre Med preparing for doctor.

"I expect to receive from this institution credits to go to California University in September, 1951.

"I intend to take examination for license in Doctor on 1958."

Citizenship: "Born Seattle, Washington, in August 15, 1930. Race is white. I am a citizen or subject of the United States."

His "court record: None."

"Conscientious objection to war," Series XIV has not been [6] filled out.

Series XV Physical Condition. He had no physical defects.

"Registrant's statement regarding clasisfication." He did not request any particular classification.

There is the certificate and signature of the registrant. He states that all the foregoing statements are in his own handwriting.

Now there is in the file, may it please your Honor, a certain affidavit——

The Court: Is there any statement in there concerning a request for exemption?

Mr. Karesh: No request for any exemption.

The Court: Read me again the pertinent parts concerning exemption just exactly.

Mr. Karesh: "Registrant's statement regarding classification.

"In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class"—and it is left blank.

I might add, your Honor, that the instructions say that "it is optional with the registrant whether or not he completes this statement and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of registrant on the basis of the facts before it, which will be [7] taken fully into consideration regardless of whether or not this statement is completed."

The Court: Read again the portion about the minister.

Mr. Karesh: The minister part just says "minister, or student preparing for the ministry."

"The instructions. Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him." And he writes "I am not a minister of religion" and he writes him "I do not regularly serve as a minister." The rest is left blank, that portion about whether he is a student or not.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 2 in evidence.

(Thereupon the Selective Service Questionnaire marked United States Exhibit Number 2 in evidence.)

Mr. Karesh: There is in the file, your Honor, a certificate from one Edwin Soderlund certifying that the registrant is an ordained minister. Apparently it was received in 1950. We will withhold this document at this time until we can set the time for it.

As U. S. Exhibit number next in order I will offer a letter of August 14, 1950, from the registrant to the Board in which he asks to be classified as a minister. I would like to read this letter to your Honor. (Reading Exhibit.) [8]

What document is this, Mr. Clerk?

The Clerk: United States Exhibit number 3 in evidence.

(Thereupon the letter was marked United States Exhibit Number 3 in evidence.)

Mr. Brill: I think it only fair to the Court, since these are being read, that the date should be pointed out. The date of this letter is August 14, 1950.

Mr. Karesh: As U. S. Exhibit next in order I offer this document from one Edwin Soderlund, apparently, and I believe it is stipulated to, that it

was filed August 14, 1950. I would like to read it to your Honor. (Reading.)

The Clerk: United States Exhibit number 4 in evidence.

(Thereupon the document was marked United States Exhibit number 4 in evidence.)

Mr. Karesh: May I have the questionnaire back, the whole thing?

Reading from the entries on the back of the questionnaire, your Honor, U. S. Exhibit 2.

"10/19/50. Classified 1-A by a vote of three to nothing.

"November 3, 1950, Form 110 mailed," which is—which is the notice of the classification mailed to the registrant.

"11/8/50. Request for personal interview mailed."

I should like to offer as U. S. Exhibit next in order a letter of November 9, 1950, from the registrant.

Mr. Brill: Excuse me. At this time we are going to ask [9] the Court to take cognizance of the fact that all of the records made by Draft Board 38 were subsequently annulled by their own order, they having found they failed to have jurisdiction of Mr. Schuman. It is true that it is in the file, but all of the actions taken before Local Board 38 subsequently were annulled by their own action.

Mr. Karesh: You mean taken by 40, and were then started over by 38.

Mr. Brill: That is correct.

Mr. Karesh: I think I said that in my opening statement.

The Court: Then if that is the fact why did you stipulate the admission in evidence?

Mr. Brill: It is part of the file. We are not going to object to anything that is in the file itself. We have nothing to hide at all. I suppose that all of the other documents——

Mr. Karesh: All that went to the Board of Appeals?

Mr. Brill: Yes, that is correct, but I think that this particular record of action taken by the other Board itself should not be——

The Court: What is the date? When was it filed?

Mr. Karesh: 7/28/51. The records of registrant were transferred to Local Board 38. We haven't come to that yet, but all these documents constitute part of the file.

The Court: Except the action taken by the Board.

Mr. Karesh: The action of course is not binding, and they [10] started all over, as your Honor will see.

The Court: All right.

Mr. Brill: The only reason I mentioned that is I felt that the Court should know that all of the actions taken by the other board, that is, Board No. 40, were subsequently annulled.

Mr. Karesh: This is the letter of appeal, your

Honor, of November 9, 1950. We offer it as U. S. Exhibit next in order.

(Reading exhibit.)

The Clerk: United States Exhibit Number 5, in evidence.

(Thereupon the letter was marked United States Exhibit Number 5 in evidence.)

Mr. Karesh: We have the minutes or the summary of the personnel hearing of 11/30/50. (Reading exhibit.)

The Clerk: United States Exhibit Number 6 in evidence.

(Thereupon the summary of the personnel hearing marked United States Exhibit Number 6 in evidence.)

Mr. Karesh: And on the back of the questionnaire is the entry: "11/30/50. Class 1-A continued. Suggest registrant appeal.

"12/30/50. Form 110 mailed.

"1/19/51. Order for Physical 1/29/51."

We would offer this copy of the Order for Physical dated January 19, 1951, to report the 29th of January, 1951. It is merely a sheet of paper, your Honor, with certain information written in; the exact copy of the physical is not presented, [11] but counsel will stipulate that this order for a physical was sent to the registrant.

The Court: Do you stipulate that all of these documents may be introduced in evidence?

Mr. Brill: Pardon?

The Court: You have stipulated all of these documents may be introduced in evidence?

Mr. Brill: All of the documents themselves may be introduced in evidence, yes, sir. If counsel is reading as to the action taken by the board, I don't believe, in view of the circumstances, that should be brought to the attention of the Court. We therefore will not stipulate those portions being read to the Court, but the documents themselves we have no objection to.

Mr. Karesh: You mean I can't read a questionnaire?

The Court: The moment you introduce a paper in evidence, the entire paper or any portion thereof may properly be read to the Court.

Mr. Brill: Then I didn't realize that it had a record here of the actions taken by the local board. It was on the back of the Selective Service Questionnaire.

The Court: Mr. Brill, I want you to go through the whole record there, take all the time you need, and make up your mind whether or not you are stipulating to the introduction in evidence—— [12]

Mr. Brill: We will stipulate to the introduction in evidence of all of the documents in the file with the exception of the record of the action taken by Board 40 during the time it acted improperly and during the time that it was incapable of acting because of lack of jurisdiction.

Mr. Karesh: Well, of course——

Mr. Brill: The documents themselves were sub-

sequently transmitted to the new board and acted as the record of the registrant before the new board, but all of the actions taken by the former board were annulled. There is a letter in the file which I think would operate to annul all of the previous actions.

Mr. Karesh: There is no question about that, but your Honor of course wanted to see if you had any objection——

The Court: All I am talking about is whether or not you are stipulating to the introduction in evidence of all of the documents. That is all I want to know.

Mr. Brill: We are stipulating—we make this stipulation: that all of the documents in the file may be offered in evidence with the exception of the record of the action taken by the improper board.

Mr. Karesh: I think, your Honor, there is no prejudice to the registrant to show what action Board 40 took.

The Court: It was annulled.

Mr. Karesh: To show it was annulled, you have to show [13] something was annulled.

The Court: That is not material.

Mr. Brill: Yes, it is not material.

Mr. Karesh: If he doesn't wish me to read any entries before Board 40, I have no objection; it is all right with me.

The Court: The papers that have been introduced in evidence up until now I understand were by stipulation.

Mr. Brill: That is correct.

The Court: All right. Let us take the next paper, one at a time, that is what we will do, so there won't be any error in this record.

Mr. Brill: Thank you.

The Court: So far all the papers that have been introduced in evidence have been introduced by stipulation.

The Clerk: That includes the last offer which Mr. Karesh just read into the record.

The Court: The last one was dated January 19, 1951.

Mr. Karesh: That is the typed order.

The Court: You may interpret it as you please.

Mr. Karesh: That is the order for a physical. It doesn't make any difference, your Honor, because that was annulled, too.

The Court: Just show it to Mr. Brill. It was stipulated that may be introduced in evidence. I don't want any half stipulations, gentlemen; I want a definite yes or no.

Mr. Brill: You were reading something. I assumed that [14] what you were reading to the Court was on this page?

Mr. Karesh: That is all I read.

Mr. Brill: We cannot stipulate that what you pointed out to the Court as being on this document is on it, because it is not.

Mr. Karesh: I said if it was not agreed to by counsel, then I could call the clerk and she could say it was the piece of paper put into the typewriter when the original order to report for physical was typed; that she did not have an extra copy so

that was typed on a blank piece of paper. It doesn't make any difference. This action was annulled. I will withdraw it then; it doesn't make any difference.

The Court: Make up your mind. Do you withdraw it?

Mr. Karesh: I will offer it. If he doesn't want it, he can object.

Mr. Brill: We will object to that because it is necessary to read from actions of the board.

The Court: Put it aside and put the clerk on for that purpose, and take the next one. Just put it aside. If you want to offer it in evidence, you put the clerk on.

Mr. Karesh: All right. As U. S. Exhibit next in order a letter of January 22, 1951, protesting the 1-A classification.

The Court: Any objections to the introduction?

Mr. Brill: No, your Honor.

The Court: Admitted. [15]

The Clerk: United States Exhibit Number 7.

(Thereupon the letter was marked United States Exhibit Number 7 in evidence.)

Mr. Karesh: In the interests of time, I should ask your Honor to read it.

The Court: Go ahead.

Mr. Karesh: May it please your Honor, as U. S. Exhibit next in order and as one exhibit I offer a letter with certain documents and affidavits filed with the board received on or about April 11, 1951. The letter refers to the accompanying documents.

The accompanying documents consist of an affidavit from one Harry Whitcomb, Edwin Soderlund, Joe Dani, Henry Dani, Edward Higdon, Louie H. Gerber, Fred Maes, E. C. Fryer, Jack Watson, Glen E. Woods, and then a document with many signatures with the endorsement:

"We, the undersigned, do hereby testify that we know that David Schuman is an ordained minister of the gospel. We have been present when he has preached in our Kingdom Hall, and we know that he participates in all phases of the ministry."

There are about three pages of signatures. I will offer these and let your Honor inspect them.

The Court: Stipulated they may be admitted?

Mr. Brill: Yes, your Honor.

The Court: Admitted. [16]

The Clerk: United States Exhibit Number 8 in evidence.

(Thereupon the letter and enclosures referred to were marked United States Exhibit Number 8 in evidence.)

Mr. Karesh: As U. S. Exhibit next in order, a copy of a letter sent to the State Director of Selective Service under date of March 29, 1951, and a copy of a similar letter written to the National Director of Selective Service March 29, 1951. I offer these as one exhibit.

The Court: Will it be stipulated they may be admitted?

Mr. Brill: Yes, your Honor.

The Court: Admitted.

The Clerk: United States Exhibit Number 9 in evidence.

(Thereupon the copy of a letter referred to marked United States Exhibit Number 9 in evidence.)

Mr. Karesh: As U. S. Exhibit next, your Honor, is a card from the Watch Tower Bible and Tract Society to David Schuman. It was received at the same time the affidavits were received. I would like to show this to your Honor.

The Court: Any objection?

Mr. Brill: No objection, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 10 in evidence.

(Thereupon the card referred to was marked United States Exhibit Number 10 in evidence.)

The Court: I do not see any date on this [17] card.

Mr. Karesh: That was received, your Honor, April 11, because in one of the letters of transmittal there is reference to that card—this document that you have on the top there and those affidavits. That was received by the board at the same time those affidavits were received.

As U. S. Exhibit next in order we would offer the special form for conscientious objectors completed by the registrant and filed July 2, 1951, in which he filled out Series B claiming exemption from both combat and non-combatant training in

service by virture of his religious training and beliefs. There is a small pamphlet part of the questionnaire, of the form:

"The peoples' greatest need. Public address by D. Schuman."

And there are some attachments to complete the space which was inadequate in the form. I would like to read from this C. O. form.

"Do you believe in a Supreme Being? Yes.

"Describe the nature of your belief"—(continues reading from exhibit.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 11 in evidence.

(Thereupon the special form referred to was marked United States Exhibit Number 11 in evidence.) [18]

Mr. Karesh: As U. S. Exhibit next in order, may it please your Honor, we offer a letter from the Coordinator Selective Service System Major Ferrill to Board 40 indicating that registrant is properly within the jurisdiction of Board 38 and not within the jurisdiction of Board 40. I would like to read the letter and offer it, of course. (Reading.)

The Court: Any objection?

Mr. Brill: No objection, your Honor.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 12 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 12 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, a letter of July 28, 1951, telling the registrant that his board is now 38 and no longer 40 and his registration with 40 is cancelled.

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 13 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 13 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we offer a statement made by the clerk August 2, 1951 (reading).

The Court: There being no objection——

Mr. Brill: No objection.

The Court: It may be admitted. [19]

The Clerk: United States Exhibit Number 14 in Evidence.

(Thereupon the statement referred to was marked United States Exhibit Number 14 in Evidence.)

Mr. Karesh: The next appropriate entry on the back of the questionnaire is, "7/28/51. Records of registrant transferred to local board 38, board having jurisdiction over area of registrant's address."

Mr. Brill: This has already been offered in Evidence, has it?

Mr. Karesh: The questionnaire, yes.

Mr. Brill: All right.

Mr. Karesh: That is on the back of U. S. Exhibit 2 with these attachments now.

Mr. Brill: All right. These now are the effective entries on the back of the questionnaire.

The Court: They have already been admitted.

Mr. Brill: Yes.

The Court: Either party may read any portion of it.

Mr. Karesh: "Minutes of actions by local board and appeal board:

"9/11/51, classified 1-A, vote three to nothing." This is, of course, a classification by Board 38.

"September 12, 1951, Form 110 mailed 9/21/51. Received letter from registrant requesting personal appearance before board bringing attorney and [20] several witnesses."

And as U. S. Exhibit next in order we would offer this letter of September 19 from the registrant received by the board September 21, 1951.

The Court: Any objection?

Mr. Brill: No.

(Mr. Karesh thereupon read the letter referred to.)

The Court: It may be admitted.

The Clerk: United States Exhibit Number 15 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 15 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

"9/24/51. Mailed letter to registrant explaining the law does not permit attorney and witnesses to appear—registrant may appear alone."

As U. S. Exhibit next in order I would offer the letter of September 24, 1951. (Reading letter.)

The Court: Admitted.

The Clerk: United States Exhibit Number 16 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 16 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

"10/1/51. Mailed card to registrant explaining board will meet 10/8/51."

As U. S. Exhibit next in order there as one Exhibit, two [21] affidavits filed with the board at the time of the personal appearance on October 8, 1951, one from Verne G. Reusch, presiding minister and one from Lyman H. Pinard. I will let your Honor glance at them.

The Court: Any objection?

Mr. Brill: No objection.

The Court: Admitted.

The Clerk: United States Exhibit Number 17 in Evidence.

(Thereupon the affidavits referred to were marked United States Exhibit Number 17 in Evidence.)

Mr. Karesh: The next entry is 10/8/51. Classified 1-A. Continued after personal appearance before board. Request as an ordained minister and request as a conscientious objector denied.

Vote two to nothing.

As U. S. Exhibit next in order, the stenographic transcript of the personal appearance before the members of the local board 38. This document, your Honor, is about nine pages in length. I would submit it.

Your Honor, may we not take the recess so I could assemble the other documents?

The Court: Is there any objection to the admission of this?

Mr. Brill: No objection. I would like to have the number of that. What will the number of that be?

The Clerk: Will it be admitted? [22]

The Court: Yes.

The Clerk: United States Exhibit Number 18 in Evidence.

(Thereupon the transcript referred to was marked United States Exhibit Number 18 in Evidence.)

Mr. Karesh: May we take a recess?

The Court: We will take a recess for ten minutes.

(Recess taken.)

Mr. Karesh: As U. S. Exhibit next in order a letter of October 22, 1952—sent October 17 and received October 22. It is a letter appealing the classification and also contains a request with a

letter to the California Appeal Board indicating that there were certain inaccuracies in the stenographic report, according to the registrant. We offer these documents, your Honor, as one exhibit. I would read the letter of October 17 received October 22, then I would submit to your Honor this rather lengthy letter to the Appeal Board in which he indicates that there are some errors in the stenographic record.

(Reading letter of October 17, 1951.)

We might as well, your Honor, offer the so-called corrections of the stenographic transcript stated by the registrant as a separate exhibit. I would like to show it to your Honor.

The Court: Let us take one at a time then.

Mr. Karesh: All right.

The Court: There are two exhibits. We can't have two at one time. Any objection to the one the clerk now has in his [23] hands?

Mr. Brill: No, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 19 in Evidence.

(Thereupon the letter of October 17, 1951, referred to was marked United States Exhibit Number 19 in Evidence.)

Mr. Karesh: That is one, and the U. S. Exhibit 20, I presume, I would like to submit to your Honor for your reading.

The Court: Any objection to that?

Mr. Brill: No, your Honor.

The Court: It may be admitted.

The Clerk: United States Exhibit 20 in evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 20 in Evidence.)

Mr. Karesh: The next entry on the back of the questionnaire:

"10/22/51. Received letter from registrant requesting appeal of classification; registrant also stated summary made by clerk of his personal appearance was not accurate and requested that appeal not be sent to appeal board until his personal summary can be included.

"10/30/51. Received letter from registrant for appeal board, with his own summary of his personal appearance before local board members 10/8/51."

As U. S. Exhibit next in order we offer the covering letter which sent these corrections or the corrections as the registrant [24] stated of the stenographic transcript of the board.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit 21 in Evidence.

(Thereupon the covering letter referred to was marked United States Exhibit 21 in Evidence.)

Mr. Karesh: The next entry on the questionnaire:

"11/1/51. The entire file of registrant forwarded to Appeal Board."

Next entry: "11/8/51. Appeal Board Panel No. 3 reviewed this file and determined that the registrant should not be classified in either 1-A-O or 1-O, by a vote of 3-0. under the circumstances set forth in subparagraphs (2) or (4) of Section 1626.25 of the Selective Service regulations. Signed C. E. Patty, chairman, Appeal Board Panel No. 3."

As U. S. Exhibit next in order we would offer the change of address sent by the registrant to the local board. He is now living at 44 Aztec Street. It was received by the board January 8, 1952.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 22 in Evidence. [25]

(Thereupon the change of address referred to was marked United States Exhibit Number 22 in evidence.)

Mr. Karesh: A group of hand bills indicating the registry is giving certain speeches, may it please your Honor, we will offer as one Exhibit. Some were filed in '52, some in the latter part of '51. They speak for themselves.

The Court: Any objection?

Mr. Brill: No objection.

The Court: They may be admitted.

The Clerk: United States Exhibit Number 23 in Evidence.

(Thereupon the hand bills referred to were marked United States Exhibit Number 23 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we would offer a copy of an order to report for armed forces physical examination, the original of which was mailed February 13, 1952, directing the registrant to report for physical examination in San Francisco the 29th of February, 1952.

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 24 in Evidence.

(Thereupon the copy of an order referred to was marked United States Exhibit Number 24 in Evidence.)

Mr. Karesh: The entry of the minutes and attached sheet to the questionnaire:

"2/13/52. Mailed SSS Form 223, order to report for [26] preinduction physical examination 2/29/52."

Another entry: "3/17/52. DD Form 62 mailed (Certificate of Acceptability). Acceptable."

We offer as U. S. Exhibit next in order this Certificate of Acceptability, copy of which was mailed to the registrant. It certifies that on February 29, 1952, the registrant was found fully acceptable for induction into the armed services.

The Court: No objection?

Mr. Brill: No objection, your Honor.

The Court: Admitted.

The Clerk: United States Exhibit Number 25 in Evidence.

(Thereupon the Certificate referred to was marked United States Exhibit Number 25 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, may it please your Honor, we offer copy of a Notice of Hearing sent by one Earnest E. Williams, Hearing Officer, to the registrant, April 1, 1952, directing him to report for hearing on his claim as a conscientious objector April 15, 1952, in the Post Office building in San Francisco.

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted. Hearing for what?

Mr. Karesh: Hearing on his claim as a conscientious objector.

The Court: In April? [27]

Mr. Karesh: '52.

The Court: After the order for induction?

Mr. Karesh: That was the physical. The order for induction has not come.

The Court: Admitted.

The Clerk: United States Exhibit Number 26 in Evidence.

(Thereupon the copy of Notice of Hearing referred to was marked United States Exhibit Number 26 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order we

would offer the Report of Hearing conducted by the Department of Justice pursuant to Section 6 (J) of the Selective Service Act of 1948, in re: David Don Schuman (conscientious objector). Appeal from Local Board No. 38 to Appeal Panel No. 3, file No. 4-38-30-611. I would like to read it to your Honor.

The Court: Any objection to its admission?

Mr. Brill: No objection.

(Mr. Karesh thereupon read the document.)

The Court: It will be admitted.

The Clerk: United States Exhibit Number 27 in Evidence.

(Thereupon the Report of Hearing referred to was marked United States Exhibit 27 in Evidence.)

Mr. Karesh: As U. S. Exhibit next in order, we would offer a letter from the Department of Justice signed by T. Oscar Smith, special assistant to the Attorney General, to the Appeal Board at San Francisco, Panel 3, with relation to the claim of David Don Schuman as a conscientious [28] objector. I would like to read it. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit Number 28 in Evidence.

(Thereupon the letter referred to was marked United States Exhibit Number 28 in Evidence.)

Mr. Karesh: "8/11/52"—reading from the minutes of action on the back of the questionnaire: "Entire file of registrant received from Appeal Board—Retained in 1-A."

At this time, may it please your Honor, we would offer the individual appeal record, SSS Form 120. It shows the action of the local board as well as the minutes of action by the Appeal Board. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It will be admitted.

The Clerk: United States Exhibit Number 29 in Evidence.

(Thereupon the appeal record referred to was marked United States Exhibit Number 29 in Evidence.)

Mr. Karesh: I will now read the next entry on the back of the questionnaire:

"8/11/52. Form 110 mailed."

That is the notice of the action of the Appeal Board.

"8/12/52"—the next action—"mailed SS Form 252, [29] Order to report for Induction 8/28/52."

As U. S. Exhibit next in order we would offer this SS Form 252, Order to report for Induction. (Reading.)

The Court: Any objection?

Mr. Brill: No objection.

The Court: It may be admitted.

The Clerk: United States Exhibit 30 in Evidence.

(Thereupon the Form 252 referred to was marked United States Exhibit 30 in Evidence.)

Mr. Karesh: It is stipulated, your Honor, that the registrant, in compliance with the order on the 28th day of August, reported for induction at the San Francisco Armed Forces Induction Station, and on the 28th day of August, 1952, he completed all the process of induction except the final step which would have changed him from a civilian to a soldier.

It is stipulated that if the military officials were here, they would testify that David Don Schuman was read the ceremony, was told that the step forward would constitute his induction into the armed forces; that his name was read; that he was told to step forward to be inducted and that he knowingly refused to step forward and be inducted into the armed forces.

It is further stipulated that the military officials would testify that the registrant was given a second opportunity and he was told that the step forward would constitute his induction; he was read the ceremony, and his name was called; he was [30] asked to step forward; he refused to step forward and be inducted into the armed forces of the United States, all of this occurring at San Francisco, California, the 28th day of August, 1952. Is that the stipulation?

Mr. Brill: That is the stipulation, correct, your Honor.

Mr. Karesh: Will your Honor excuse me for just

a moment while I talk to the agent? Pardon me, your Honor. I will be right with you.

As U. S. Exhibit next in order, may it please your Honor, we offer the minutes of the Board meeting of October 8, 1951, and it is a summary of the stenographic report. I did not offer it, but counsel says it should be offered as part of a file and I will so offer it.

The Court: Any objection?

Mr. Brill: It was at our request that it is being offered.

The Court: All right.

(The document was read by Mr. Karesh.)

The Court: Let it be admitted.

The Clerk: United States Exhibit Number 31 in Evidence.

(Thereupon the summary of report referred to was marked United States Exhibit Number 31 in Evidence.)

WILLIAM G. HARRY

called as a witness on behalf of the Government, sworn.

The Clerk: Will you please state your name, address, and occupation to the Court. [31]

A. William G. Harry, special agent, Federal Bureau of Investigation, San Francisco, California.

Direct Examination

By Mr. Karesh:

Q. Do you know the defendant in this action, Mr. Schuman? A. Yes.

(Testimony of William G. Harry.)

Q. When was the first time you saw him, and where?

A. On August 28, 1952, at the U. S. Induction Station.

Q. San Francisco Armed Forces Induction Station? A. That is correct.

Q. 30 Van Ness Avenue, San Francisco?

A. 30 Van Ness Avenue.

Q. Did he give you a signed statement?

A. He did.

Q. Who witnessed it?

A. I witnessed it and Special Agent Daniel Gill, Jr.

Q. Also of the Federal Bureau of Investigation?

A. Also a special agent.

Q. Were any promises of any kind or character made to him? A. No promises at all.

Q. Is the statement in your handwriting or in his handwriting?

A. The statement is in my handwriting except the last paragraph.

Q. What is the technique of taking a statement? How does it happen to be in your handwriting?

A. Usually we write it out in our handwriting to save time, [32] and the person is allowed to read it and make any corrections.

The Court: Never mind the technique. What did you do this time?

Q. (By Mr. Karesh): What did you do here?

A. The same procedure.

Mr. Karesh: I don't think you have answered.

(Testimony of William G. Harry.)

The Court: Tell us what you did here. Never mind what the usual procedure is. What did you do?

A. I wrote out the statement after interviewing Mr. Schuman and wrote down the things that he told me and the answers he had given to my questions. Then I gave the statement to him to read and to attest at the end that he had read it and it was true and correct.

Q. (By Mr. Karesh): In other words, he told you the facts and you wrote them down?

A. Yes.

The Court: Did he read it afterwards?

A. Yes.

Q. Before he signed it?

A. Before he signed it.

Mr. Karesh: I would like to offer the statement, your Honor.

Mr. Brill: No objection.

The Court: It may be admitted.

(Mr. Karesh thereupon read the [33] statement.)

The Clerk: United States Exhibit 32 in evidence.

(Thereupon the statement referred to was marked United States Exhibit 32 in evidence.)

Mr. Karesh: I have no other questions of this witness.

Mr. Brill: No questions.

Mr. Karesh: This is the Government's case, your Honor.

Mr. Brill: If the Court please, we wish to make a motion. However, in other cases that have been handled by me, we reserved our motion until the completion of the defense, and if that would be agreeable to the Court, we will do so in this case, if we may.

The Court: You wish to make a motion at the end of the case to be considered as of this time by the Court?

Mr. Brill: Yes, your Honor, yes.

The Court: Permission granted.

Mr. Brill: At this time——

The Court: However, if you will designate the motion——

Mr. Brill: It is a motion for dismissal and for acquittal.

The Court: You are making a motion now for dismissal and you will present the argument, and you want that considered as having been made at this time and the Court to consider it at the end of the case?

Mr. Brill: That is right, your Honor.

The Court: Motion for dismissal is made at this time and will be argued and passed on at the end of the case as of this [34] time.

The Clerk: Yes, your Honor.

Mr. Brill: At this time we are asking Mr. R. J. Abbaticchio, agent in charge of the Federal Bureau of Investigation, 422 Federal Office Building, to produce, pursuant to the subpoena issued and served upon him, the report of the agent or agents of the Federal Bureau of Investigation which is in

writing which was used by the Hearing Officer of the Department of Justice and the Assistant Attorney General in their investigation and determination of the claim of deferment from training and service under the Selective Service Act of 1948 as a minister and a conscientious objector made by David Don Schuman, Selective Service Number 4-38-30-611, Local Board Number 38, San Francisco, California, now in his custody.

Mr. Karesh: May it please your Honor, is there a return of service on Mr. Abbaticchio?

Mr. Brill: We have here a——

Mr. Karesh: Mr. Abbaticchio was never served.

The Court: Well, have you such papers in your possession, Mr. Karesh? If you have, produce them.

Mr. Karesh: Your Honor, we cannot produce them. We cannot produce the FBI file. However, there has to be proper service. Under instructions from the Attorney General, had Mr. Abbaticchio been present, he would have declined to produce them.

Mr. Brill: I have here an affidavit of service upon Mr. [35] Abbaticchio. I might say to the Court that I received a phone call from his office saying that the papers would be here, but that they would decline to produce them at this time.

The Court: Is he here?

Mr. Brill: I don't know.

Mr. Karesh: Mr. Abbaticchio is not here. Mr. Abbaticchio was not served.

Mr. Brill: We will file this affidavit of service.

Mr. Karesh: I would like to see it.

The Court: Can't you gentlemen make up your mind whether this man was served?

Mr. Karesh: Yes, your Honor; Mr. Abbaticchio was not served. I don't know who made this service on him. He was not personally served.

The Court: Let's see that.

Mr. Brill: As I have said to the Court before, I received a phone call from Mr. Abbaticchio's office saying that an agent would be here, but they would refuse to present these papers to the Court pursuant——

The Court: I am more concerned at this time with this other matter, whether or not he was served.

Mr. Karesh: He was not served.

The Court: How could that be?

Mr. Brill: Well——

Mr. Karesh: They may have left it at the desk, but that [36] is not personal service on Mr. Abbaticchio. It makes a statement that there was personal service.

The Court: Where is Mr. Abbaticchio?

A Gentleman in the Courtroom: I don't know, sir.

Mr. Brill: Were you the gentleman we called at the office about this matter?

Mr. Karesh: Let's don't conduct this——

The Court: Just a moment. Do you want to file this?

Mr. Brill: Yes, your Honor.

Mr. Karesh: May it please your Honor, we challenge that.

The Court: You may challenge it. On the face of it, it is in order. I have nothing else to go by. I have here an affidavit of service. It will be filed.

Mr. Karesh: We move to strike it out. The man isn't present. We challenge that. We know that Mr. Abbaticchio was not personally served.

The Court: You have to present evidence. We have an affidavit here before us, an affidavit of service. The man has been served, according to the record. If you desire to produce evidence to the contrary, you may do so.

Mr. Karesh: We are not going to produce the record, because Mr. Abbaticchio was not served. If your Honor wishes to issue——

The Court: If you want to make a motion to strike the service which appears before us, you will have to produce evidence. [37] You can get Mr. Cornish here—Mr. or Mrs. Cornish, who made the service. We cannot merely accept the statement of counsel of the fact as to whether another person was served—as to whether you were served, Mr. Karesh——

Mr. Karesh: I was not served.

The Court: Or Mr. Brill. Your statement is not sufficient because you are both officers of this Court, a statement that some other person was served would not be sufficient.

Mr. Karesh: It was always my opinion that if there was any challenge to the affidavit that the person filing it had the burden; we don't have to offer contrary proof.

The Court: The affidavit on the face of it states it was served.

Mr. Karesh: We have a right to ask him the question whether it was served.

The Court: Bring him in.

Mr. Karesh: We don't know where Mr. Abbaticchio is.

The Court: Where is Mr. Abbaticchio?

Mr. Brill: We perhaps can solve this entire matter by now requesting that the Court order the United States Attorney to produce the records which were requested in that subpoena. I was advised——

The Court: You make a motion for the production of records. I will hear from you, Mr. Karesh, in opposition to the motion for the production of the records. Do you know what documents [38] he is talking about?

Mr. Karesh: I do.

The Court: What is your position?

Mr. Karesh: He can't make me produce the documents. They are not my documents.

Mr. Brill: Yes, they are the FBI records.

The Court: They are in your possession, are they not?

Mr. Karesh: At this time.

The Court: Mr. Karesh has told you he has the possession of the documents. Mr. Karesh states he has opposition to the motion. He may address the Court orally. Go ahead.

Mr. Karesh: The United States Attorney has no authority to produce any FBI records. The person to produce them, if at all, would have to be the head of the office. If he came here he would decline to

produce them under the instructions of the Attorney General. As a matter of fact, even if he had come before the Court properly served, we would have offered the decision of M. Upton vs. United States, 194 Federal 2nd 508, which is clearly in point, a decision of the 6th circuit. I will show it to your Honor. That says he doesn't have to produce them even if properly served.

The Court: I am merely concerned with the fact that he isn't here at this point.

Mr. Brill: Have you finished, Mr. Karesh?

Mr. Karesh: I am now informed that Agent Nourse was the [39] man that perhaps was served. He served him like serving the clerk of this Court by serving the man on the complaint desk. We will prove that that service was not made on Mr. Abbaticchio I would like to have the maker of the affidavit here.

The Court: I am not concerned with that. What are you going to do? Mr. Brill has asked you for the production of certain documents and you are refusing the production of those documents. The Court will hear further from you on that subject alone. He is asking for the production of certain documents which you refuse.

Mr. Karesh: If your Honor please, the authority to produce FBI reports is in the Department of Justice; it is under instructions of the Attorney General. You can't force a United States Attorney to produce an FBI report when the report itself says it is confidential.

The Court: Have you finished your presentation?

Mr. Karesh: Yes, your Honor.

The Court: Mr. Brill, you have produced an affidavit that Mr. Abbaticchio has been served?

Mr. Brill: That is correct.

The Court: Do you need an attachment for him to appear at 2 o'clock or will he come voluntarily at 2 and at that time we will discuss what is to be done?

Mr. Karesh: I don't know——

The Court: Service has been made upon the man, according [40] to the records.

Mr. Karesh: I am certain this affidavit on file is a false affidavit.

The Court: That may be. It may be. If the affidavit is false, this Court will act accordingly. If you want me to proceed upon the affidavit, Mr. Brill, I will.

Mr. Karesh: May I ask the agent, where is Mr. Abbaticchio?

The Court: Yes, go ahead. You can find out before we proceed further. The process of this Court can be used to the fullest extent to get any witnesses here.

Mr. Karesh: Would you make a phone call to the office? Your Honor, we don't know where Mr. Abbaticchio is. If he has been transferred whether he is in town we don't know. But I do feel that, in fairness to Mr. Abbaticchio, we should try to get hold of the man that we say actually was served. We are not going to bring back Mr. Abbaticchio

from Salt Lake City where he has been transferred on the basis of an affidavit that we conclude is not so. We will try to get Mr. Abbaticchio——

The Court: Before we proceed, Mr. Brill, do you want to withdraw the affidavit, for this reason, because if there is anything the matter with that affidavit, this Court is not going to allow affidavits to be filed here that are not true.

Mr. Brill: I will say this to the Court: I received a phone call from the Federal Bureau of Investigation that—the man's name I don't recall; I just asked the agent here in [41] Court if he was the man who phoned me. The conversation was to this effect: "We have received a subpoena. We will have the records in Court. However, an agent will be there and we will refuse to produce them for the perusal of the Court." That was the conversation. He also advised me that Mr. Karesh has a copy of the record, and I certainly assumed that they would have them there. I just made a motion to the Court requesting that Mr. Karesh as Assistant United States Attorney produce those records which he has in his possession before the Court. I don't want to make an issue of Mr. Abbaticchio. I don't know whether the man was served, but I did receive that phone call. Now if your Honor wishes to pursue my motion for production of those records, which I have been informed will be in Court this morning—that was the only object of this subpoena.

Mr. Karesh: I might say that I instructed the Federal Bureau of Investigation that unless Mr.

Abbaticchio was personally served himself that nobody else was to bring the records; that it would have to be Mr. Abbaticchio. That is why I know he wasn't served.

The Court: If there was some person served, whoever it was, if he had these records in his possession, he should be here this morning and we would then determine whether they would be admissible.

Mr. Karesh: He doesn't have the record in his possession. He has no right to bring in the records any more than my [42] secretary can come to Court with the records.

The Court: What I am concerned with is the statement that some person was served. Why wasn't that person here, whoever it is?

Mr. Karesh: Does somebody appear when the subpoena is addressed to a particular person?

The Court: Was there no other person specified?

Mr. Brill: No, your Honor.

Mr. Karesh: No, it is just R. J. Abbaticchio.

Mr. Brill: I might say to the Court, with Government offices such as the Federal Bureau of Investigation, the procedure for many years has been to address the subpoena to the head of the office. The head of the office never appears in Court in these cases, he sends a deputy. When I received the phone call, I felt sure that it would be carried out in that manner. This isn't the first case of this kind that I have had, nor is it the first time that we have had this controversy over records, but this is the first time that Mr. Karesh has taken the atti-

tude that we must serve this man personally before he will come in with the records. I now make a request upon the court, a motion that Mr. Karesh be instructed to produce those FBI reports which I think he has in his possession and they are in Court today.

Mr. Karesh: If I were to produce any such records, I would be in flagrant violation of instructions from the Department of [43] Justice and subject to dismissal.

Mr. Brill: You have them with you today?

Mr. Karesh: I don't have them in my file today, in the first place. Even if I did, you wouldn't be entitled to them, and you can't make me produce confidential records.

The Court: What are these records, Mr. Brill, so that we can determine exactly what we are talking about? What is it that you are asking for?

Mr. Brill: Government's Exhibit Number 27 purports to be a report of a hearing conducted by the Department of Justice pursuant to Section 6(j) of the Selective Service Act of 1948.

The Court: Just a moment. I have it here, Exhibit 27. Let's see what it is.

Mr. Brill: There is a preliminary statement and then there is a statement of facts upon which the Hearing Officer makes his decision. In the statement of facts there is referred to the Federal Bureau of Investigation reports. The reports do not disclose the names of the persons who were interrogated nor the statements made by them, but merely the opinion or the conclusion drawn by the agent,

who then turns the report over to the Hearing Officer, and upon the basis of that report and the oral testimony and the production of the registrant before him, he comes to his conclusion. Now it is our position——

The Court: You are speaking about Page 2, paragraph 2, of the Exhibit 27? [44]

Mr. Brill: That is correct.

The Court: Just a moment. Let me read it.

All right, now, what is it? What reports are there that you are talking about that you want if you could have them?

Mr. Brill: We want the Federal Bureau of Investigation reports showing the names of the persons who were interrogated so that we may have an opportunity to cross-examine them. This is a criminal trial that we are now before your Honor on. Under the Federal Constitution we have the right to confrontation of witnesses. These were reports or statements made by persons unknown to us. We had no opportunity to cross-examine them to test the veracity or verity of the statements made. Upon the basis of those statements the classification of 1(a) was given, which ultimately resulted in this criminal prosecution. It is our contention that under the Federal Constitution Sixth Amendment, which expressly provides for the right to trial by confrontation of witnesses, we have been deprived of that through the procedure that has been followed, we have a right to know the names of the witnesses who were interviewed by the Federal Bureau of Investigation for that reason.

The Court: I want to ascertain definitely what it is you are asking for. You want the FBI report showing the names of persons interrogated?

Mr. Brill: That is correct.

The Court: Does that cover the field of what you are asking [45] for, so that I will be able to study upon it and pass upon it at one time?

Mr. Brill: That is correct.

Mr. Karesh: May I——

The Court: Wait a minute. Mr. Brill hasn't finished.

Mr. Karesh: I thought he had finished; I'm sorry.

The Court: I will give you a lot of time to talk. Just take one at a time.

Mr. Brill: In line with that, the report, which is the Federal Bureau of Investigation report which was the basis of this decision, should be produced in court so that we may have an opportunity to cross-examine the agent himself who made the report to determine whether or not he was biased, whether or not the report which he made and his conclusions are truthful. The entire report should be brought before the court and we should have a right to cross-examine the agent and the persons whom he interrogated with relation to this report which was the foundation of the Hearing Officer's ultimate conclusion in this matter.

The Court: Well, there are separate things. One is you are asking for the entire report.

Mr. Brill: That is correct.

The Court: Aside from asking for the entire report, you would like to have the names of the persons interrogated?

Mr. Brill: That is correct. [46]

The Court: What else aside from the entire report, that is, if you can have it?

Mr. Brill: That would give us all the names.

The Court: If you cannot have the entire report, what particular matters would you like to have?

Mr. Brill: Then we would like to have the agent's name—agent or agents' names, and the persons who were interrogated.

The Court: Anything else?

Mr. Brill: No, I think that would cover it all, your Honor.

Mr. Karesh: May I say, your Honor, that this same problem was raised before his Honor Judge Roche. Proper service was made. The agent came in with the report. Judge Roche looked at the report and said "No, Mr. Covington, the lawyer who is the general counsel for Selective Service will not see these reports. They have the names of confidential informants."

This is not the case of a man accused by some one. A procedure has been set up in the Department of Justice. The effect of the disclosure of confidential memoranda is to destroy the effectiveness of this act.

This problem has been squarely passed upon by the Sixth Circuit and it was squarely passed upon by his Honor Judge Roche.

If this man had been properly served he would have been here. Had your Honor wanted a report, it would have been shown to your Honor and I am confident your Honor would have decided in the same way that his Honor Judge Roche did who the question was [47] passed to directly. But under no stretch of the imagination can the United States Attorney be forced to give FBI reports in direct contravention of instructions of the Department. The proper person is the head of the office, who would first decline to give them to you under the instructions of the Department.

The Circuit Court has gone into this very question in a contempt proceeding arising in Illinois, which was reversed by the Supreme Court.

But we say that where they attempt to secure information which under the authorities they are entitled to have, we have a right to demand strict compliance with the statute requiring personal service upon Mr. Abbaticchio himself.

The Court: That may be, but I wanted to hear anything further you have to offer on the other subject, assuming that Mr. Abbaticchio does come here with the documents in question. I am now hearing discussion——

Mr. Karesh: We rely on the decision of the Sixth Circuit Court of Appeals squarely in point; and I may say the question of Judge Roche's ruling of refusal to disclose the report is now before the Court of Appeals for the Ninth Circuit and is to be argued November 17. The Chief Judge has ruled on that, and the Sixth Circuit has ruled on that.

We rely on that. They are not entitled to these reports.

The Court: At this time we will take a recess until 2 o'clock.

(Recess taken.) [48]

October 17, 1952, at 2:00 P.M.

Mr. Karesh: May it please your Honor, my superior, the United States Attorney, Mr. Tramutolo, informs me that he was just now served with a subpoena to produce certain documents. At this time we would move to quash the subpoena because it appears from the subpoena that it is defective on its face for it asks the production of FBI records. Obviously the person to be subpoenaed would be the FBI.

The Court: Has he them in his possession?

Mr. Karesh: I have.

The Court: Have you the documents in your possession?

Mr. Karesh: I have the documents. Mr. Tramutolo does not have them, but of course, as my superior, he would have authority over the documents. But I would ask your Honor to rule on the motion to quash the subpoena as being faulty on its face. I would like to offer it and show it to your Honor.

(Handing document to Court.)

The Court: It does not state here in the subpoena that the papers are in the possession of the person to whom it is directed.

Mr. Brill: I don't believe, your Honor, that it

is necessary to state in so many words that they are in his possession. If as a matter of fact they are in the hands of Mr. Karesh they are in fact in his possession. If he does not have them, he may appear in court and say that he doesn't at [49] present.

The Court: Well, if the papers are in the possession of Mr. Karesh, I would suggest that you give them to the clerk so I can examine them to determine whether or not they would be admissible in the matter. Then I can determine whether they are admissible.

Mr. Karesh: I have not been served.

Mr. Brill: We now make the request.

The Court: Service does not have to be upon you. A demand upon you by the opposing counsel for documents in your possession would be sufficient. You can produce the documents. We will then determine whether they are evidence in the matter or could be evidence.

Mr. Karesh: Well, if the witness——

The Court: There is no way for the Court to determine whether or not they are admissible in evidence without examining them. I fail to see at this moment how they could be admissible, how they could be evidence in this matter, for this reason: that the report to which you referred, Mr. Brill, sets forth the ground upon which the board made its classification. If any of those grounds are not true—I mean if any of those statements are not true, you can produce evidence to refute them, of course. But from your own statement, the only thing you disagree with is the conclusion and not the facts.

Mr. Brill: No, your Honor. I haven't made myself clear. [50] I would like to clarify it at this time. The Hearing Officer used certain reports which were given him; no names were disclosed; the exact information which was obtained was not disclosed; the persons to whom it was disclosed were not mentioned in the ultimate report which he made and upon which the classification was made. We have a right in a criminal case under the Sixth Amendment to the Federal Constitution to be confronted with the witnesses against us. All of these steps which were taken by the draft board and the appeal board and the Hearing Officer are steps leading up to the ultimate prosecution of this case. This is a criminal case, and we have, under the constitution and under the cases, the right to be confronted with the witnesses against us. They were in effect witnesses against us because they produced a recommendation by the Hearing Officer and by the Attorney General for a refusal to give us the classification we thought we were entitled to. Therefore, in order to refute that—we can't refute the statement made which says "we are informed such and such" unless we have the information, where the information came from, what the information is and who made the statement. And that is our position.

The Court: Mr. Clerk, let me have the Exhibit Number 27, I think it is. Which of these statements in this report would you want to refute under Exhibit 27?

Mr. Brill: We have no way of knowing without

knowing what [51] the statements were, without having the evidence produced; we have no way of knowing which statements were used in order to get the adverse decision which ultimately was made.

The Court: The statements are here. Which of these statements in these two pages do you wish to refute?

Mr. Brill: It may be that the statement which appears there—let me look at the exhibit.

The Court: Not the conclusion, but the statements of fact.

Mr. Brill: Yes.

The Court: The conclusion, of course, is a matter of opinion; but which one in this page and a half statement of facts do you disagree with?

Mr. Brill: For example: "A former landlord stated that he was somewhat of a 'smart alec.'" We have a right to know who that former landlord was.

The Court: This court would not permit testimony either for or against on that.

Mr. Brill: It is in the record.

The Court: We are only concerned with two things in this case, Mr. Brill: First, were the forms complied with; that is, was he given the regular hearing that he is entitled to? Were the notices required by law given? Second, was there any basis in fact? If there is any basis in fact, all the reports that you could possibly produce this court couldn't pass upon, even if you produced a preponderance of the evidence to the contrary. [52]

Mr. Brill: Of course all of this goes to the ques-

tion of whether or not there is any basis in fact. If counsel will stipulate that nothing in these statements is sufficient to justify the finding that was ultimately made, we will be willing to withdraw our request.

The Court: Mr. Brill, as a matter of law, the fact that he became a member of Jehovah's Witnesses after he had been registered is in itself a basis of fact from which a reasonable conclusion might be drawn. Whether the court would draw it or not is unimportant. This court does not sit in this matter ab initio.

Mr. Brill: Yes, I understand that, your Honor.

The Court: I haven't that power if I wanted to exercise it. If the draft board, the selective service board, and the appeal boards acted in the manner provided by law and if there was any basis in fact, this court has no choice in this matter. Do you disagree with that statement of the law?

Mr. Brill: That is a correct statement as the law now exists, your Honor.

The Court: I will take a look at the report that you asked for, if you will give it to the clerk, and I will then determine whether or not there is any reason why it should be introduced.

Mr. Karesh: So that Mr. Tramutolo may be excused, your Honor, I will state the subpoena having been directed to my superior—— [53]

The Court: I would suggest that you withdraw the other subpoena, Mr. Brill.

Mr. Brill: I would like to do that.

The Court: I will state further that you made a

statement this morning that it was a common practice for someone to be served, which may be true, but it isn't a common practice that an affidavit be made when one man is served when another is served, not in this court. You made that statement.

Mr. Brill: That is right.

Mr. Karesh: I will accept service of the subpoena if your Honor will permit so Mr. Tramutolo may be excused.

The Court: The subpoena as far as Mr. Tramutolo is concerned is discharged.

Mr. Karesh: Your Honor asked me with relation to the reports. May I, for the record, repeat Section 3229—that is Department of Justice Order 3229, which reads as follows, it is an instruction to us, Department of Justice Order 3229, filed May 2, 1946, 11 Federal Register 4920, reading:

"All official files, documents, records, and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. [54] No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.

"Whenever a subpoena duces tecum is served to

produce any of such files, documents, records, or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer there to and respectfully decline to produce the records specified therein, on the ground that the disclosure of such records is prohibited by this regulation."

Supplement Number 2 to that order, dated June 6, 1947, provides in part:

"To all United States Attorneys:

"Procedure to be followed upon Receiving Subpoena Duces Tecum.

"Whenever an officer or employee of the Department is served with a subpoena duces tecum to produce any official files, documents, or information, he should at once inform his superior officer of the requirements of the subpoena and ask for instructions from the Attorney General. If in the opinion of the Attorney General circumstances or conditions make it necessary to decline in the interest of [55] public policy to furnish the information, the officer or employee on whom the subpoena is served will appear in court in answer thereto and courteously state to the court that he has consulted the Department of Justice and is acting in accordance with the instructions of the Attorney General in refusing to produce the records. It is not necessary to bring the required documents into the court room and on the witness stand when it is the intention of the officer or employee to comply with the subpoena by submitting the regulation of the Department (Order

Number 3229) and explaining that he is not permitted to show the files.

"If questioned, the officer or employee should state that the material is at hand and it can be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed. The records should be kept in the United States Attorney's office or some similar place of safe keeping near the court room. Under no circumstances should the name of any confidential informant be divulged.

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its [56] business, and the custody, use, and preservation of the records, papers, and property appertaining to it." [56-A]

If the court please, in conformity with Supplement Number 2, dated June 6, 1947, we submit to the court for its inspection these reports and assert once more that they are not material to this inquiry, and furthermore, it would be in the interest of public policy not to disclose the names of the informants. And once more I would call your Honor's attention to the case of United States vs. Lloyd Luke Knox, a similar case, where a demand was made before his Honor Judge Roche, an agent of the FBI came up, Mr. Backman, and submitted the record to the court for his inspection, and the court looked it over and refused to permit it to go

into evidence or any inquiry thereon. This case is a like case.

We do call your attention to the Imboden case which we cited to your Honor. I will now pass these to your Honor for his inspection. There are two reports, one from the Seattle office and one from the San Francisco office.

The Court: I merely call the attention of the record to the fact that Mr. Tramutolo, United States Attorney, has been present in court here prior to the time he was discharged. He appeared in response to the subpoena and the subpoena was discharged, as I have said.

Mr. Karesh: Yes.

Mr. Brill: For the purpose of the record, I should like to call the court's attention to two cases on this question: Joint Anti Fascist Refugee Committee vs. McGrath, 341 US 123, [57] and Bailey vs. Richardson 341 US 918, on the point involved here.

The Court: In order that the court may have an opportunity to read this and determine the ruling upon the matter, we will now take a recess for ten minutes.

(Recess.)

The Court: The court rules against the request of defendant and returns this to the United States Attorney. The court finds there is nothing in it as far as the issues of this case are concerned.

Mr. Brill: Shall we proceed at this time?

The Court: Proceed.

Mr. Brill: We have served a subpoena on Mr. Backman of the FBI.

Mr. Karesh: Do you wish him?

Mr. Brill: No, the subpoena was for the same documents, and there is no need——

Mr. Karesh: May he be released from that subpoena?

Mr. Brill: Yes, certainly.

Mr. Karesh: Mr. Backman of the FBI was served at the recess.

The Court: By stipulation he may now be excused?

Mr. Brill: Yes.

Mr. Karesh: Yes. Thank you.

Mr. Brill: Call Mr. Joseph Bonzani. [58]

JOSEPH BONZANI

called as a witness by defendant, sworn.

The Clerk: Would you please state your name, address, and occupation to the Court?

A. Joseph C. Bonzani, Manager, Bank of America, 16th and Mission Branch, 2001 Mission Street, San Francisco.

The Clerk: And your residence, sir?

A. 1688 Dolores.

Direct Examination

By Mr. Brill:

Q. Mr. Bonzani, you are a member of Board 38?

A. Yes, sir.

(Testimony of Joseph Bonzani.)

Q. Having to do with the classification under the Selective Service Act, is that correct?

A. That is correct.

Q. And you were a member of that board during the month of October, 1951? A. Yes, sir.

Q. Do you have any independent recollection of having been a member of that board at a personal hearing had for the defendant in this case, David Schuman? A. Yes.

Q. Do you have a personal recollection of that?

A. Yes.

Q. I show you here Government's Exhibit Number 31 and ask you whether you have ever seen that document. [59] A. Yes, sir.

Q. I notice that the signature in the lower right hand corner is typed with the name "J. Bonzand"?

A. That is right.

Q. Is that right. A. That is correct.

Q. Is that your signature? A. No.

Q. Was there an original of that or was there another copy of those minutes which you did sign?

A. This was the only one we have.

Q. That is the only one you have?

A. Yes.

Q. Did you see that at or about the time it was typed? A. At the following meeting.

Q. The following meeting? A. Yes.

Q. And did you read it over? A. Yes.

Q. And all of the facts set forth in that truly represented the minutes as you recalled them at that time of the hearing had, is that correct?

(Testimony of Joseph Bonzani.)

A. This was taken by the clerk of the board.

Q. Pardon.

A. This was taken by the clerk of the [60] board.

Q. I notice at the end of the minutes it is stated "Time elapsed in hearing one hour five minutes. Retained in 1-A, request for deferment as student-minister and conscientious objector denied."

A. Right.

Q. Was there a request for a deferment as a student-minister?

Mr. Karesh: Objected to on the ground, your Honor, that the best evidence are the records themselves. We have a stenographic report.

The Court: Stenographic report?

Mr. Karesh: Yes, that is merely a summary of the stenographic notes of everything that occurred.

The Court: He is entitled to show by the record——

Mr. Karesh: May I say this, your Honor: Under the decisions, no matter what happened before the local board, it now becomes immaterial. For that reason I should now like to cite a decision of the Ninth Circuit which is binding on your Honor. Regardless of what happened before the local board, the decision of the Board of Appeal supersedes this, and that is why we have the Board of Appeal set up. I should like to read the decision to your Honor. I have it here in a brief that I have heretofore submitted before the Circuit Court in an-

(Testimony of Joseph Bonzani.)
other case. If I might have your Honor's indulgence for a moment——

The Court: All right.

Mr. Karesh: This is the decision of the United States [61] Court of Appeals for the Ninth Circuit, Cramer vs. France, 148 Federal Second 801, and I am quoting the case:

"Moreover, we think the trial court is right in its assumption that appellant, having taken an appeal from the local board to the appeal board and secured a ruling of the latter as to his classification, cannot now complain to the court concerning the conduct of the local board. The action of the board of appeals completely supersedes the action of the local board in classifying appellant, although the classification is the same."

In Falbo vs. United States, Mr. Justice Rutledge in a concurring opinion, 320 US page 555, said as follows:

"If, therefore, the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the Appeal Board's action."

And may I say that as recently as November 21, 1951, in Cox vs. Wedemeyer, Number 12565, I do not have the Federal Second decision, (192 Federal Second 920), the Court of Appeals for the Ninth Circuit cited with approval the decision of Cramer vs. France from which I have read, 148 Federal Second 801.

And furthermore, may it please your Honor, un-

(Testimony of Joseph Bonzani.)

der the decision of the Supreme Court of the United States the determination of whether there has been an arbitrary action is predicated upon the file itself and everything else becomes [62] extraneous. If, as your Honor suggested in previous rulings, there is any basis in fact for the clarification, then the issue ends.

And here is what Cox vs. United States (68 S. C. 120) says:

"Perhaps a court or jury would reach a different result from the evidence but as the determination is for selective service, its order is reviewable 'only if there is no basis in fact for the classification.' "

Citing Estap vs. United States:

"Consequently when the court finds a basis in the file for the board's action, that action is conclusive. The question of the preponderance of evidence is not for trial anew. It is not relevant to the issue of the guilt of the accused for disobedience of orders. Upon the judge's determination that the file supports the board, nothing in the file is pertinent to any issue proper for jury consideration." [63]

It was the intent of Congress, if your Honor please, that draft boards would not be placed on trial for any supposed motive or any supposed prejudice if the file contains the basis in fact. And here we do have a basis in fact, because this man did not join Jehovah's Witnesses not after 1948 alone, the date of registration, but in September, 1950, he became immersed and so to speak a minister, after the Korean incident occurred and they

(Testimony of Joseph Bonzani.)

began drafting young men under the act. So therefore any questions directed to this witness would be immaterial on two grounds, first, the basis in fact; second, that the action of the local board has been supplanted by the decision of the board of appeal and if it were to have any pertinent application it would have to have been on the board of appeals, and we would have objected on the ground that the issue must be determined from the file itself under the latest decision of the Supreme Court of the United States affirming the decision of the Ninth Circuit.

The Court: Which case is it that says you can show bias or prejudice? The Estap case?

Mr. Karesh: The Estap case doesn't say anything about it.

The Court: There is a later one?

Mr. Karesh: He is thinking about some decision in some other circuit which speaks about bias or prejudice which runs, in my opinion, purely contrary and into the teeth of the decision of Cox vs. United States. It says if there is any basis [64] in fact, no matter what the members think, if the members can support their decision that is all, if there is any basis in fact in the file. We object to the line of testimony.

The Court: I will allow that question.

Mr. Brill: You may answer that question.

The Court: Would you read the question?

(Reporter read the question.)

(Testimony of Joseph Bonzani.)

The Court: Do you remember whether there was or not yourself?

A. Whether he made the request I do not remember, but the board——

The Court: All right; next question. Just answer if you remember. Don't try to stretch your memory if you don't remember it.

Mr. Brill: The board considered it as being a request for a deferment as a student minister; is that correct?

A. That is correct.

Q. In their examination of him at that time of the hearing they examined him in the light of what they thought was a request for a deferment as a student minister; is that correct?

Mr. Karesh: Objected to, your Honor, as the best evidence is the stenographic report which is in evidence. It will speak for itself.

The Court: That calls for the conclusion of the witness. You are trying to ask the question what was in the minds of the [65] other Draft Board members.

Mr. Brill: I am sorry; I will withdraw that. I will ask him what was in his mind at the time of the interrogation.

Mr. Karesh: Objected to as calling for the conclusion of the witness, and furthermore the best evidence of what occurred is that stenographic report.

The Court: Unless the stenographic report is incorrect. If you want to interrogate on those lines,

(Testimony of Joseph Bonzani.)

if you want to go into the life of this witness, it is hardly material. You might ask him what he said, what he did.

Mr. Brill: I had hoped it wouldn't be necessary for me to divulge our position in the presence of the witness which will tend to allow him to clear up the matter which I am about to ask.

The Court: I will allow the question. I don't want to put you in the position of having to divulge this information.

Mr. Brill: I might say this, however, your Honor: Our position is this——

The Court: I know what your position is, and I don't want the witness to have the——

Mr. Brill: All right.

The Court: Answer the question. I think the best way to get around it is to let him answer.

Mr. Brill: Very well.

The Witness: Let me have the question. [66]

The Court: He wants to know what was in your mind at the time of the interrogation. What kind of an answer have you to make to that? Maybe he was thinking of a fishing trip.

Mr. Brill: With reference to the claim of exemption; I am sorry. With reference to the claim for exemption made by Mr. Schuman, did you understand he was claiming exemption as a student minister?

Mr. Karesh: Objected to as incompetent, irrelevant and immaterial, if your Honor please. The action of the Local Board was supplanted by the

(Testimony of Joseph Bonzani.)
action of the Appeal Board. He could have misunderstood everything; he could have thought he was applying for a student minister or minister as distinguished from student preparing for the ministry; it is incompetent, irrelevant and immaterial for the reason, if your Honor please, that the summary which the board made of the stenographic record was submitted to the registrant, he went over it, and, according to the record, corrected what he said was a mistake and submitted it to the Board of Appeal. The Board of Appeal acted and unanimously decided adversely to the registrant. Anything he did is immaterial.

The Court: I can't see how it could possibly have any bearing on it.

Mr. Brill: If the Court please, the law requires due process in the processing of these registrants. I think that is clear from all of the cases. If the registrant made an [67] application for exemption as a minister and the board only considered his application for exemption as a student minister, different rules apply for determining the question of whether he is a minister or a student minister. Our position is this: that he has been denied due process of law since they never considered the question of whether or not he should have exemption as a minister.

According to their own minutes, which were written pursuant to the regulations, as I will point out, the minutes were required by the regulations to be prepared and a summary was required to be pre-

(Testimony of Joseph Bonzani.)

pared so that the summary could be sent to the Appeal Board. That is the basis upon which the Appeal Board determines the validity of the action of the local board.

Mr. Karesh: May I interrupt you there?

Mr. Brill: May I continue, please, Mr. Karesh?

Mr. Karesh: That never went to the Board of Appeal and it is incompetent, irrelevant and immaterial. That is the board's own minutes.

Mr. Brill: May I finish my argument?

Mr. Karesh: You may if you will——

The Court: Allow Mr. Brill to finish.

Mr. Brill: This was produced from the file that was brought here to court and it was stipulated to, which was part of the record that went up under the cover sheet to the Appeal Board. [68]

Mr. Karesh: That is not correct.

The Court: Mr. Karesh, I have to ask you again—if you haven't a pencil, the clerk will supply you with one, and you can make notes, and when Mr. Brill has finished you will have a full opportunity——

Mr. Karesh: When he challenges the stipulation——

The Court: You will have opportunity to answer. From many years' experience I have learned to accept with caution all statements of counsel on both sides.

Mr. Karesh: Thank you, Judge.

The Court: If you will take pencil and paper and write that down——

(Testimony of Joseph Bonzani.)

Mr. Karesh: I have done it.

The Court: Take all the time you want to explain your point.

Mr. Brill: Thank you. As I stated, there are different rules to be applied by the board in determining whether or not exception is based on a student minister, regular minister, or ordained minister. I am quite sure your Honor is familiar with the regulations, and I will burden your Honor again with them at the time the matter closes to point out our points. But at this time I wish to point out that, according to the record itself, the record indicates that the denial of his claim for exemption as a student minister was the question in the minds of the Hearing Officer or the Draft Board at the time of this [69] determination as indicated by their own records which cannot be impugned at this time. My inquiry here is to further bring out from this witness as to the question of where the inquiry should go to determine whether or not he is entitled to exemption as a student minister.

I will further point out from the record from the questions themselves that they had in mind that he was requesting exemption as a student minister, because they repeatedly in the transcript and in this record harp or question him on the question "Did you attend a regular Divinity School?" I am reading now from this excerpt itself: "Trained in theocratic school in San Francisco. No formal examination for ordination." Elsewhere it states in

(Testimony of Joseph Bonzani.)
here: "Has not attended divinity school recognized by Selective Service."

All through the inquiry made, it indicates that the inquiry was on an erroneous basis. He had claimed exemption as a regular minister. The inquiry was one directed to the question of whether he was exempt as a student minister. Now it is true that he did not attend a divinity school which was a recognized divinity school, and on that basis their determination that he was not entitled to deferment as a student minister was perhaps correct, because the law states that you must be in attendance at a regular recognized divinity school.

Now he has never, I say according to the record, had a determination of whether he was entitled to exemption as a [70] minister. The record speaks for itself. And that is the inquiry I wish to develop at this time.

The Court: Do you remember whether it was discussed either way?

A. The whole three questions were discussed.

Mr. Brill: Well, I should like to develop, if I may. That is the purpose for this inquiry.

Mr. Karesh: Now, if your Honor please——

The Court: Now wait a minute. Had you finished, Mr. Brill?

Mr. Brill: Yes, I had.

The Court: Do you want to be heard?

Mr. Karesh: Yes, your Honor. I say this never went before the Appeal Board, and it is immaterial. The record that went to the Board of Appeal was

(Testimony of Joseph Bonzani.)

that—what exhibit, may I ask, is the transcript of testimony of October 8? I will read the section. I have the photostat.

The Court: You can read from that.

Mr. Karesh: "Primary vocation is student. Continued in 1-A. Request denied for classification as ordained minister and conscientious objector." That is what they considered.

Furthermore, may it please your Honor, the record, transmittal record sheet, which came back with the Board of Appeals decision—you will notice that this one—it is SSS Form 120, [71] I don't know the exhibit, it says: "Individual appeal record, date classified 1-A, September 11, 1951; forwarded on appeal taken by registrant, requests 4-D classification, minister, Jehovah's Witnesses."

The Court: Next question. He has answered the last question. Now you go on.

Q. (By Mr. Brill): Mr. Bonzani, do you know or are you familiar with what the regulations provide in determining whether or not a man is a regular minister?

Mr. Karesh: Objected to, your Honor, as incompetent, irrelevant and immaterial; the local board is not on trial; and furthermore, it is the Appeal Board action, not the local board. He does have to say whether he knows or he doesn't. He is presumed to know.

Mr. Brill: We submit that we have a right to inquire as to whether or not board members for themselves understood the law applicable in these

(Testimony of Joseph Bonzani.)

cases. Obviously if they did not understand that there was a difference, or misinterpreted it, then the man did not have a fair hearing before them, because it is quite possible that their conclusion may have been otherwise.

Mr. Karesh: Draft Board members who serve without compensation do not have to submit themselves to this line of inquiry we have been making. Furthermore it is the Appeal Board, not the Local Board. That action has been wiped out by the Appeal Board. It is a record de novo, and our Supreme Court has so [72] held, in anything that this witness would testify to about his mental postures, what he knew about regulations, is incompetent, irrelevant and immaterial.

Mr. Brill: We submit that under the decided cases it is very competent, because——

The Court: You have got all the regulations in the office or copies of them?

A. Yes.

Q. The members of the board and the clerk discussed the various regulations at various times; is that right? A. Yes.

Q. You read them from time to time?

A. If there is something we do not understand, we refer to the book.

The Court: You don't remember what the book says—if you want to know what is in the book, you want to see the book, I presume.

A. Right.

The Court: He is a pretty intelligent man, the

(Testimony of Joseph Bonzani.)

manager of a bank, and as men go has his viewpoint the same as all of us have different viewpoints. I guess he can read regulations and follow them as a layman does. And of course Draft Board members are laymen. That is why we have Appeal Boards; that is why we have Department of Justice investigations; that is why we have United [73] States courts.

Mr. Brill: We should like at this time, with all due respect to your Honor, to assign the remarks of your Honor and the questions as prejudicial to the defendant, and ask that the questions and remarks be stricken from the record.

The Court: Let's see which question? The last question that you asked?

Mr. Brill: The leading questions that were asked of the witness.

The Court: Well, they were leading, and I think the Court has power to assist in order to arrive at the facts. Any question in your mind as to the questions I asked?

A. No.

Q. They were clear to you? A. Yes.

The Court: I think I will let them stand. If I struck them from the record—there is no jury present; they won't have any effect. If they were detrimental, the detriment is suffered; if I strike them I won't remedy it. I don't think there is any detriment, but if there is there is nothing much can be

(Testimony of Joseph Bonzani.)
done to change it. So go ahead. However, you have your exceptions.

Mr. Brill: Certainly. Do I understand that your Honor will now allow my questions with reference to what this member of the Draft Board, the present witness, knows about the distinction between regular ministers and ordained ministers? **[74]**

The Court: I don't think it is material at this point. The man is not qualified as an expert.

Mr. Brill: No, but——

The Court: Any more than the Judge can very well be called on to go into a long discussion as to how he arrived at his viewpoint.

Mr. Brill: Yes, but there are many cases, your Honor, that hold that the defendant has a right to show that when his case was considered an erroneous interpretation of the law was made; that if——

The Court: I will allow you to introduce any evidence you want of bias, prejudice, motives—anything of that nature—or that the ordinary processes were not gone through; that is to say, that he did not receive notice, or that a meeting was not held. Sometimes boards certify that they held meetings. It has been known sometimes on very rare occasions that a board has certified it held a meeting when it hasn't held one, something to that effect, which goes to due process. That isn't due process that you are talking about. You are talking about the fact that you desire an opinion on a legal question.

Mr. Brill: No, my interpretation of due process

(Testimony of Joseph Bonzani.)

is not only the right to be heard, but the right to be heard by a Judge who——

The Court: Knows the law? [75]

Mr. Brill: ——who, after hearing you, applies the correct law to you. And I think there are many cases I can cite to your Honor on this same question where the draft boards were held to have misinterpreted the law or applied the erroneous law, and therefore due process has not been followed. This is not a judicial proceeding. It is a proceeding at which they cannot bring an attorney. The record itself speaks for itself. They wouldn't allow him to bring an attorney. He attempted to get the shorthand reporter before the board; that is true, Mr. Bonzani, isn't it?

A. Yes.

Mr. Brill: He brought that shorthand reporter with him.

The Court: But you have that fact in the evidence now. Your remedy is with the legislative authority and the executive department which make these regulations. We cannot quarrel with them at this late stage. Maybe the act is faulty; that is the fault of the legislative branch. Maybe the regulations are faulty; that would be the fault of the executive branch. We can't do anything about that.

Mr. Brill: Maybe the enforcement is faulty. And the only recourse we have is to make a showing of that kind at a trial.

The Court: No. I am going to limit you to these things:

(Testimony of Joseph Bonzani.)

First, due process in the sense that all the requirements of law were complied with as far as notice of meetings were concerned; [76]

Second, I will allow you to go a little further than that, and some cases do not allow that. I will allow you to show any motive or prejudice or bias. But as far as discussion of how they arrived at their decision, the record is the best evidence. If the record doesn't sustain their decision, if there was no basis in fact for their decision, it could not stand.

Mr. Brill: That is right.

The Court: And the record is the only determinant of that, not what was going through his mind, and whether the record itself sustains it. So if you will limit yourself to that field, I think that will be proper. Further than that, as to his processes of thought and as to his exact knowledge of draft regulations, I don't think that that is a proper inquiry at this time.

Mr. Brill: We make an offer of proof at this time which we intended to produce in evidence; that this witness did not understand the different test that is applied to a person claiming an exemption as a student minister or as a regular minister or as an ordained minister, which is indicated by the questions and answers received at that hearing.

The Court: Well, I would say that that is already in evidence, as to the questions and answers at that hearing.

Mr. Brill: Well, I should say that he did not

(Testimony of Joseph Bonzani.)
know the difference that there was. Now if your Honor is limiting me [77] in the right to inquire as to what he knew about the regulations, we will submit to that; and after we have made our offer of proof——

The Court: Well, suppose instead of making a general ruling, which is always bad, suppose you ask the questions and I will pass on them one at a time. I am not limiting you; I am withdrawing the limitation. You can ask the questions. Perhaps a question or two would be proper.

Q. (By Mr. Brill): You were present at the hearing and were present when questions were asked of the registrant; isn't that correct? I am referring to the hearing had on October 8, 1951.

A. Yes, sir.

Q. That was in the evening? A. Yes, sir.

Q. Who else was present?

A. You mean the draft board members?

Q. Who else was present in the room?

A. There were two other members of the draft board, Mr. Dooley and Mr. Soldivani; the clerk of the board——

Q. Who else?

A. The clerk of the board, Johnnie Ellington, and Miss Eubanks.

Q. You are certain that all three members of the board were there that evening?

A. Yes, sir. [78]

Mr. Karesh: If you will permit me, I ask that he refresh his recollection by the minutes.

(Testimony of Joseph Bonzani.)

The Court: He is entitled to look at the minutes.

Mr. Brill: He has them right there.

The Court: Is that a summary?

A. That is a summary.

Q. Does that summary show they were all there?

A. I remember them.

The Court: He says he remembers them.

Mr. Karesh: May I see those? Would you look and refresh your memory from the minutes?

A. The minutes show two members, but the three members were there.

Mr. Brill: The minutes show two members, but actually three members were there; is that correct?

A. Yes.

Q. Did all three of you ask questions?

Mr. Karesh: May I ask that the witness be shown that document? He is being queried about what happened, and the best evidence is the stenographic record.

Mr. Brill: No, this isn't a question of establishing it under the best evidence rule.

The Court: Mr. Bonzani, if you can remember without being shown the record, you will so state. You are not required by law to remember something that you do not remember. If you do [79] remember it, you may state it, but that is as far as you are supposed to go. We have a transcript. We have what is asserted to be a transcript of the proceedings.

Mr. Brill: It is alleged to be.

(Testimony of Joseph Bonzani.)

The Court: That is what I say; it is alleged to be. What was your last question?

(The reporter read the last question.)

Mr. Karesh: I would suggest that he be shown the stenographic transcript and let him look through it.

Mr. Brill: I think we are entitled to an answer.

Mr. Karesh: He is your witness. Are you attempting to impeach your own witness? I would ask that he be shown the record.

The Court: That is the first time I have heard a proper objection. If you will make a proper objection I will rule. This is his own witness. He cannot impeach him.

Mr. Karesh: That is right.

The Court: If you will make the proper objection——

Mr. Karesh: I make that objection.

The Court: This is not an adverse witness.

Mr. Brill: I believe that he would be, because he is an employee, although not paid by the Government——

The Court: Well, we all are. I am an employee of the Government. I assure you that it doesn't affect me in my rulings. [80]

Mr. Brill: No, but upon this trial we have a right to treat him as an agent of the Government, the United States Government, who is the plaintiff in this case, and he would certainly be an adverse witness, your Honor.

(Testimony of Joseph Bonzani.)

The Court: Did you call him as an adverse witness?

Mr. Brill: I don't believe under the law we are required to call him, under 2055 of the California Code.

The Court: 43 (b).

Mr. Brill: 43 (b).

The Court: Go in and get my code of criminal procedure. It is in the side of my desk. It is a paper-bound volume. Go ahead, anyway.

Let us take our questions one at a time so we can get somewhere.

Mr. Brill: All right.

Q. I think the question was, did all of you ask questions or just one of you?

A. Well, I can't remember everybody asking questions that night.

Q. You don't remember? A. No.

Q. Let me ask you this: Isn't it quite unusual to have a transcript of the questions and answers?

The Court: Sustained.

Q. (By Mr. Brill): Why in the record does there appear a transcript of questions and [81] answers?

The Court: That objection is sustained, too. Next question.

Q. (By Mr. Brill): Did you ask him the question of whether or not he would salute the flag?

A. Did I personally?

Q. Yes. A. That I do not remember.

(Testimony of Joseph Bonzani.)

Q. Was that question asked?

The Court: Whether somebody else asked him?

Mr. Brill: Yes, was that question asked?

A. I do not remember.

Q. I would ask you to refresh your recollection from this transcript and also from the minutes.

Mr. Karesh: May it please your Honor, I object to this line of inquiry. He asked the witness whether or not a certain statement was made, and the witness says he doesn't remember. Then he furnishes him with a stenographic report that is in evidence. What is the pertinency of this?

The Court: You were the one that suggested that he be given that record.

Mr. Karesh: That is right, Judge.

The Court: All right, let him see it. If it helps him any, all right.

A. Yes, the question was asked.

Q. (By Mr. Brill): Now why was that question asked?

Mr. Karesh: Wait a minute; don't answer the question. [82]

Q. (By the Court): Who asked him?

A. Mr. Dooley.

The Court: Mr. Dooley asked it.

Q. (By Mr. Brill): Why was that question asked, if you know?

Mr. Karesh: Objected to as calling for an opinion and conclusion.

Mr. Brill: This is a board that meets as a body——

(Testimony of Joseph Bonzani.)

Mr. Karesh: We have Mr. Dooley here.

Mr. Brill: We can bring him here.

The Court: You may ask Mr. Dooley.

Q. (By Mr. Brill): Did you exclaim, upon that being asked and the answer being no, "What? You don't salute the flag?" Did you say that?

A. I personally?

Q. Yes. A. I don't remember saying that.

Mr. Brill: You don't remember saying that? We have no further questions.

The Court: Any questions?

Mr. Karesh: No.

The Court: This witness may be excused?

Mr. Brill: Yes, your Honor.

The Court: All right; you may go back to the bank.

The Witness: Thank you.

The Court: Next witness. [83]

Mr. Brill: We will ask Mr. Dooley to take the stand.

MATTHEW J. DOOLEY

called as a witness on behalf of the defendant, sworn:

The Clerk: Will you please state your name?

A. Matthew J. Dooley, 1508 Hobart Building.

Direct Examination

By Mr. Brill:

Q. Mr. Dooley, you are an attorney and you are also a member of Local Board 38; is that correct?

(Testimony of Matthew J. Dooley.)

A. I am.

Q. And you were present at a meeting at which the defendant made a personal appearance before the draft board members on October 8, 1951; is that correct?

A. I have no independent recollection; we have had perhaps thirty or forty or fifty meetings since then, and obviously I didn't make a special note of this. Our meetings go on every month, or every week. We have some seven or eight thousand registrants. The last meeting we had a month, or two weeks ago, three weeks ago, I think we had about forty—thirty-five or forty registrants in there. It is very difficult, to say the least, for me to say that I have an independent recollection of this particular situation. I don't have.

Q. You have my undying respect for the amount of effort and time you are putting in on this work.

A. Thank you. [84]

Q. Mr. Dooley, since you have no independent recollection, can you tell us whether or not it is customary for the board to make a transcript of the questions and answers given at these hearings?

A. We have done that in a great many instances, yes.

Q. Do you remember this instance by reason of the fact that Mr. Schuman appeared with a former official court reporter and requested the right to have the reporter merely take in shorthand what was said by each of you?

(Testimony of Matthew J. Dooley.)

A. I think so, because it was the first time such request was made of the board.

Q. And do you remember also refusing to allow the reporter to take notes of the hearing?

A. Yes, I think we made that very clear that the regulations did not permit that.

Q. This is a rather lengthy transcript here, and I will show you from Government's Exhibit Number 18, page 9, down near the bottom, you asked the question——

Mr. Karesh: May I interrupt a minute to ask your Honor whether counsel is proceeding under the impression that this man is being called as an adverse witness, because there aren't any such in criminal cases.

The Court: He hasn't made the assertion; there is nothing for me to rule on. Go ahead. You call his attention to what? Do you get the place where he called your attention to? [85]

A. Yes, I have, your Honor.

The Court: All right.

The Witness: Does he wish me to read it?

Mr. Brill: Yes.

A. What line. I see "Mr. Dooley" at various places. Would you indicate the particular sentence, the particular question?

Mr. Brill: Did you ask the question: "Would you salute our flag?"

A. Oh, that is the one you refer to?

Q. Yes.

(Testimony of Matthew J. Dooley.)

A. Presumably, yes. I have no independent recollection of that.

Q. Well isn't that part of the record of Board 38?

A. If this be part of the record, I would say yes; but I don't know whether it is part of the record so far as my independent recollection is concerned. If it was introduced in evidence, I think it is.

The Court: The question is, now that you see the paper do you remember whether you said that or don't you remember?

A. Frankly, your Honor, I have no recollection of the situation at all.

Q. (By Mr. Brill): That would have no relevancy as to the question of whether or not he was a conscientious objector or a minister, would it, Mr. Dooley?

Mr. Karesh: Objected to, your Honor. [86]

The Court: I want an answer to that; I want to know whether he was biased or prejudiced.

A. None whatever. We certainly were fair with the boy; we gave him an hour's time which was more than the usual time we gave to registrants.

Q. (By Mr. Brill): I understand that. The question was: that was not relevant to the question of determining whether or not he was a minister or conscientious objector, was it?

A. You mean——

Q. The question of whether he would salute the flag?

(Testimony of Matthew J. Dooley.)

A. It was not relevant to what, you say? Pardon me; I didn't get the question.

The Court: Was there any connection between one and the other? Is that what you mean?

Mr. Brill: That is correct.

The Court: It is a little difficult to understand some of these things, some of these words.

Mr. Brill: I'm sorry, your Honor.

Q. (By Mr. Brill): Was the question of whether he would salute the flag material to a determination of whether he was a minister or a conscientious objector?

A. I have no recollection of that. If you want to know my present opinion, I will give it to you.

Q. But you have no recollection of your opinion at that time?

A. I assume it would be the same as it is now. I don't think [87] it would be particularly material.

Q. You had information that a number of registrants were claiming deferment because of conscientious objection, had you not?

A. You mean me personally?

Q. Well, in the Board. A. You said me.

Q. Well, you, along with the Board; isn't that correct?

A. You mean the Board sitting as a Board?

Q. Yes.

A. Yes, I think we have had a number in our Board in the numbers interviewed, like any other registrant.

(Testimony of Matthew J. Dooley.)

Q. And a number of these were members of a sect known as Jehovah's Witnesses; isn't that correct?

A. I don't remember about the number. Frankly I don't know whether it would be one, two, or more members of our Board who are members of Jehovah's Witnesses. I have no independent recollection, frankly.

The Court: You mean registrants?

The Witness: Registrants, yes.

Q. (By Mr. Brill): So that you have no recollection of whether or not you had before you a member of Jehovah's Witnesses prior to October 8, 1951?

A. No, I have no recollection of that. We would not have, because they come before us, we try to give them a square deal [88] in our lights, and if a man is a Catholic or a Protestant or something else, that isn't particularly important to us, frankly.

Q. Is there anything in that transcript or anything, let us say, on that one page that has anything to do with saluting the flag other than the question you just read to us and the answer given?

A. That requires me to read the entire page.

The Court: You tell us whether there is not, Mr. Brill.

Mr. Brill: There isn't anything.

The Court: All right, there is nothing else on the page. There is no use of taking up our time——

Q. (By Mr. Brill): What prompted you to ask

(Testimony of Matthew J. Dooley.)

the question out of the blue "Would you salute the flag?"

Mr. Karesh: Objected to; he is impeaching his own witness; he is arguing with his own witness.

The Court: I will allow this question: what prompted you to ask—do you remember what prompted you to ask?

A. At that time I do not, your Honor. I can't go back a year and determine what was in one isolated case, what prompted us to ask a certain question. That would be superhuman. I would have a superhuman memory to answer you truthfully. Frankly, I have no recollection.

Q. (By Mr. Brill): As a matter of fact, you are personally prejudiced against Jehovah's Witnesses, aren't you? [89] A. Absolutely not.

Mr. Brill: No further questions.

Mr. Karesh: No questions.

The Court: You have no bias or prejudice against Jehovah's Witnesses, have you?

A. None whatever, your Honor.

Q. And you try your best, no matter what religion they belong to, Jehovah's Witnesses or any other——

A. Certainly, we try to judge rightly on the facts.

Q. How long have you been on the board?

A. I served on the board since 1938 through the war, and then the new board——

The Court: 1940?

(Testimony of Matthew J. Dooley.)

A. '40 to '45. And then the new board was created and I was reappointed. I have a background of experience on it.

The Court: Any questions?

Mr. Karesh: No questions.

The Court: Next witness.

Mr. Brill: If the Court please, we will rest at this time.

The Court: Do you desire to present any argument?

Mr. Brill: I would like to make a motion at this time.

The Court: That is right.

Mr. Brill: At this time defendant makes a motion for judgment of acquittal. At the close of all the evidence the defendant moves the Court to render and enter a judgment of [90] acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure for the following reasons:

1. The evidence is insufficient to sustain a conviction for a violation of the Selective Service Act of 1948 as Amended.

2. The undisputed evidence shows that the 1(a) classification is arbitrary, capricious, and without basis in fact.

3. The draft boards acted arbitrarily, capriciously, and without any basis in fact, and in the teeth of the undisputed evidence showing that the defendant was a minister of religion engaged in teaching the principles of a recognized religious organization as his vocation when the board finally

put the defendant in Class 1(a) and ordered the defendant to report for induction, and refused to place the defendant in Class 4(d).

4. That the Local Board acted arbitrarily, capriciously, and without any basis in fact and in violation of due process of law in that the evidence shows they refused to follow the definition and standard set up by the Selective Service Act, Section 16, Title 1 as Amended, for determination of who is a minister of religion, which section provides as follows:

"The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect or organization, of which he is a member, without having been formally ordained as a minister of religion and who is [91] recognized by such church, sect, or organization as a regular minister."

The evidence discloses that the draft board, at the hearing, attempted to determine the question of deferment as a minister upon the sole basis of whether or not the registrant attended a "recognized divinity school or college." At this point we think, in fairness, that the Court should read the transcript of testimony given before the local board.

The Court: I have read it.

Mr. Brill: You have. It will be seen there that the only attempt was to determine the schooling that this defendant had received. The regulations have no bearing upon what schooling a man may have received. The regulations and the interpretation by General Hershey of the Act itself indicate

that one who received no schooling may be a minister dependent upon the work, the actual fact, rather than what schooling or basis the claim was upon.

5. The draft board acted arbitrarily, capriciously, and without basis in fact and in the teeth of the undisputed evidence showing that the defendant was conscientiously opposed to participation in war in any form, by reason of religious training and belief, when the board finally put the defendant in Class 1(a) and ordered the defendant to report for induction and refused to place the defendant in Class 1-O.

6. That the local board denied defendant due process of [92] law, contrary to the Fifth Amendment of the Constitution of the United States, and Sections 1622.1, subdivisions (c) and (d) and 1622.43, subdivision 2, and 1622.14, subdivision (a) of the Selective Service Regulations, in that the personal hearing accorded the defendant, as indicated by the minutes of the personal appearance before the local board meeting held October 8, 1951, shows that the board considered the request for deferment made by defendant as one being made by a student minister rather than as a minister; that in view of the indication in the minutes, the defendant has in fact had no hearing before the local board as required the provisions of section 1624.2, subdivision (b) of the Selective Service Act on the question for deferment as a minister but only as a student minister.

7. That the Appeal Board denied the defendant due process of law, contrary to the Fifth Amend-

ment of the Constitution of the United States, in that the Appeal Board acted upon the recommendation of the Department of Justice pursuant to the provisions of the Selective Service Act and that the Department of Justice in its letter of recommendation dated July 24, 1952, has misquoted and misinterpreted the provisions of the Selective Service regulations to be used in determining the question of the right to classification as a conscientious objector in that they have stated the law to be that the registrant must establish, and I quote, "that such alleged objections are based [93] upon deep seated conscientious convictions arising out of religious training and belief," whereas the provisions of Section 1622.14, subdivision (a) of the Regulations of the Selective Service Act provide as follows:

"In Class 1-O shall be placed every registrant who [93-A] would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces."

and Section 6(j) of Title 1 of the Act provides as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

At this time I think I would like to call the Court's attention to that letter dated July 24, 1952,

from Plaintiff's Exhibit 28, I think it is. I should like to read this letter itself, which brings home the point we are making. It is addressed to the chairman of the Appeal Board and is written by J. Oscar Smith, Special Assistant to the Attorney General.

"After examination and review of the entire file and record, the Department of Justice finds that the conscientious objections of the above-named registrant are not sustained on the ground that he has failed to establish that such alleged objections are based upon deep-seated conscientious convictions arising out of religious training and belief." [94] As I have pointed out, your Honor, the Regulations themselves make no such norm or standard of decision. If at the time he appears for final classification there is a showing that his religious beliefs are such and he conscientiously at that time opposes war service, that is the determining factor.

Then Number 8 of our objection or ground Number 8 for our motion: The undisputed evidence shows that the Department of Justice Hearing Officer, allegedly acting pursuant to the provisions of the Selective Service Act, failed to grant defendant a full and fair hearing, contrary to the Act, the Regulations and the Fifth Amendment to the Constitution of the United States. That a portion of the order and recommendation made by him was in excess of his jurisdiction and beyond the scope of his authority, as set forth in Section 1625.25, Subdivision 3(c) of the Selective Service Regulations which provide as follows:

"The Department of Justice shall thereupon make

an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant."

Mr. Karesh: "With respect to."

Mr. Brill: With respect?

Mr. Karesh: You said "On the character"; it says "With respect to."

Mr. Brill: Well, I am sorry—"with respect to the character and good faith of the conscientious objections of [95] the registrant. It attempts to limit the scope of the inquiry to be made by the Hearing Officer to two things: character and good faith.

Now let's see what the Hearing Officer found as to those two things—and I will ask for Exhibit 27, I believe it is. After reviewing the statement of facts this is the conclusion the Hearing Officer came to after hearing this matter and seeing the FBI report.

"Conclusion. The Hearing Officer wishes to emphasize that the registrant became actively identified with the Jehovah's Witnesses in 1949, and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty."

In other words, our position is this, and I think it is borne out by the conclusion of the Hearing Officer: that he found his character to be good; the facts indicate it, the FBI report indicates it, that his character was good and he was sincere in his conscientious belief as required by the Act. However, the thing that was added to this was the fact that he

had not been a Jehovah's Witness for more than three years. But there is no power given the Hearing Officer to make such a finding under the express inhibition set forth in the Regulations themselves, and to exceed that would be to exceed the [96] jurisdictional power expressly given him by the Act.

The Court: Where did you see that "three years"? I didn't see that anywhere, and I didn't hear anything about three years in any of these proceedings.

Mr. Brill: Oh, no.

The Court: You are just drawing the conclusion.

Mr. Brill: No, I am going by the facts.

The Court: I don't see anywhere that anybody said anything about three years.

Mr. Brill: This hearing was had in 1952.

The Court: He became a Jehovah's Witness at the end of 1949 is my best recollection.

Mr. Brill: That is correct.

The Court: In September, 1950, he was ordained a minister?

Mr. Brill: That is correct.

The Court: That is the way I recollect it. I don't remember the three years being mentioned at all.

Mr. Brill: It isn't quite three years; it is about two and a half years.

The Court: That is merely a conclusion you were drawing from the fact that they thought it wasn't long enough?

Mr. Brill: That is right; but it was a period of two and a half years, according to the records.

If your Honor wishes a case on the question of the time when the determination should be made, a case on that is [97] United States vs. Stalter, 151 Fed. (2) 633, which was a case in which several months before the hearing the status of the registrant was different but at the hearing his status had changed to that of a minister although he had only been a minister for several months. The Court held that the proper time to determine his status is as of the time of final classification, very ably pointing out that in the course of life a young man his status may change very fast; he may change from a student to a physician, which would put him in a different category; he may be elected to the bench and become exempt by reason of being a Judge; many things may occur, and therefore the only clear, logical interpretation of the Act would be that the time of his final classification shall be taken as the determining factor and it is his situation at that time that shall govern, and the mere fact that he had been a conscientious objector or a minister for six months, two years, eighteen months, should have no bearing upon the finding as ultimately made. The Justice Department Hearing Officer made the finding that he was conscientious and in good faith, which was all that was necessary, and upon that finding he should have been classified at that time under a 1-O classification.

9. That the registrant has been denied due process of law by the consideration and reliance by the

Hearing Officer upon the statements of informers or informants appearing in the [98] FBI report, which were not made known to the defendant and the consideration and reliance upon the report by the Hearing Officer, making reference to such statements, constitutes a violation of the procedural rights guaranteed to the defendant which is contrary to the Fifth Amendment and to the Sixth Amendment because the Constitution, guaranteeing a defendant in a criminal case trial the right to confrontation of witnesses, because the defendant has at no time had the right to answer the statements made to the FBI agents which appear in the report or cross-examine the persons making the statements or the FBI agent who took the testimony which has been relied upon to deny the defendant his rights to a conscientious objector classification under the Selective Service Acts and Regulations.

10. The action of the Court in construing the Act and Regulations so as not to require the Government to produce the FBI report and include it in the record in this case and the action of the Selective Service System in not including the FBI report in the file of the registrant in this case, constitutes a denial of due process guaranteed by the Fifth Amendment to the United States Constitution and a denial of the right to confrontation guaranteed by the Sixth Amendment to the Constitution.

11. If this motion for judgment of acquittal is not sustained and the defendant is found guilty upon the record in [99] this case, his rights to confrontation of witnesses against him will be denied,

thus making the Selective Service Act Regulations conflict with the Fifth and Sixth Amendments of the United States Constitution.

We would ask the Court, in view of the record and the law as we have very humbly attempted to point it out, to take into consideration this fact: his original registration was at a time when he was still in high school. His mother had been a Jehovah's Witness since 1945. He came from a broken home. Religion was not an important matter to him until he became mature enough to give it some thought.

As is indicated, he had numerous discussions with his mother—the record speaks for itself—about the Jehovah's Witnesses. He was torn, perhaps, between his early upbringing and Jehovah's Witnesses. There came a time when he became old enough so that it became an important matter to him. As he indicates in the record, he met a girl of a different faith, the Catholic faith. This perhaps brought to his attention the question of the proper religious theme for him at that time.

I am sure your Honor will take judicial knowledge of the fact that a youngster in high school doesn't give religion much thought. The question of conscientious opposition to war and other religious facts certainly do not bear heavily upon a youngster's mind. So that, therefore, the fact is that [100] in 1948 when he first registered while he was still going to high school, and in 1949, I think it was June, when he first filled out the original questionnaire, he told the truth: he was not a minister,

he had no religious scruples against engaging in war. But there came a time—at that time he was 19 years old—when he had to give it some mature thought; his life was then opening up; he was thinking of getting married, going with a girl of a different faith and then he made searching inquiry in his very young mind—and I think I am old enough now to call a boy 19 young—and then for the first time rose this question.

Now can we, in the face of the fact that his mother had been a Jehovah's Witness prior to that time and the fact that he had not matured to a point sufficient to make up his mind on a proposition, take that as the sole basis for denying him his rightful classification under the Regulations as they exist?

I think your Honor perhaps knows that I do not subscribe to that faith, but I am here as a lawyer, and I think the laws should be upheld by all of us, whether we agree with them or not. As your Honor knows——

The Court: Mr. Brill, you never have to apologize in this court or in any other court for appearing for any defendant charged with any offense. Never do that.

Mr. Brill: No, but I do want to convince your Honor of [101] my sincerity in pleading this matter and in analyzing that.

Each of the investigative bodies who investigated this boy came to the conclusion that he was sincere; that he was in good faith; that this was not done to avoid some military service. I think the

facts are patent that he knew and will submit to the humiliation and possible conviction and incarceration in a Federal prison rather than give up his faith as he has found fit to believe it or to compromise with it. I think your Honor has perhaps been familiar enough with human behavior to realize that a boy can get into the service and goldbrick and get a safe job and do all sorts of things or get himself kicked out with malice of forethought which they form to avoid military service.

We have here a boy who is convinced that his religion is right. His religion teaches him he is not to engage in the war effort in any way or contribute to it. The statement in one of the records indicates that he will serve for the national welfare provided it isn't part of the war effort.

I would sincerely urge your Honor that, in view of the record, there isn't basis in fact for the ultimate finding made by the Draft Board and to find the defendant not guilty. Thank you.

(Argument and discussion between court and counsel.)

The Court: This matter will be continued for decision to Tuesday, October 21, at 9:30. The defendant will remain [102] out on bail. We will now adjourn for the day.

(Thereupon an adjournment was taken to Tuesday, October 21, 1952, at the hour of 9:30 o'clock a.m.) [102-A]

November 7, 1952, at 10:00 A.M.

The Clerk: U. S. vs. Schuman for sentence.

The Court: Anything you desire to present to the court, Mr. Karesh?

Mr. Karesh: We recommend, your Honor, if the defendant be willing to accept noncombatant service, we would recommend to the local board the same, and then recommend that the judgment be set aside and the case dismissed, for the reason that you cannot induct men while on probation. But if he refuses to accept noncombatant military service, the Government will recommend, of course, that probation be denied, since probation is foresworn one who disobeys the lawful orders of the probation.

The Court: Mr. Brill, do you know if the defendant is willing to apply for a classification of 1-AO, which is noncombatant service, such as the Medical Corps—something of that sort, do you know?

Mr. Brill: I have discussed it.

The Court: Have you any objections to his answering the question himself?

Mr. Brill: No.

The Court: Mr. Schuman, while the court is not obliged to do this, the court can listen with a very lenient ear here if you would be willing to accept noncombatant service.

The Defendant: Well, your Honor, I would like to thank [103] the court for allowing me, and Mr. Karesh, because it is very generous, but, my conscience just will not allow me to help the war effort in any way. I appreciate it. It is a wonderful thing for you to do this for me, but it is a matter of my

conscience, what I feel inside of me, and I cannot help the war effort in any way.

I thank you.

The Court: Mr. Brill, anything you desire to say.

Mr. Brill: No, I can add nothing to do that. I would, however, urge that probation be granted here. I haven't seen the probation report, but I have no doubt it indicates that this boy has a spotless record.

The Court: Oh, yes. But probation is granted when a man realizes that he has made an error and is now willing to comply. That is the purpose of probation. You can hardly grant probation when a man does not admit an error and is not willing to comply. The probation officer advises against probation.

It is a very difficult case. In 1948, the defendant Schuman registered for the Universal Military Training Act. At the end of 1949—. He was raised in the Jewish faith. At the end of 1949, according to the evidence presented here, he met a young lady of the Catholic faith. They both decided to leave the respective faiths, which they have a right to do, if they wish, to become interested in Jehovah's Witnesses. The [104] Korean war started in June, 1950, and in September, 1950, he became immersed and, according to his claim, he became an ordained minister of Jehovah's Witnesses.

He is 22 years old.

Now, of course, the court has only three things to determine, which it did determine. First of all, his

rights were protected. He had a personal appearance before the Selective Service Board. He had a personal appearance before the Board of Appeals. All the notices required by law were given. So that is the first one.

The second thing is whether there was any bias or prejudice on the part of the board, either one. I don't know even if we have to go that far, but we permitted that. There was no prejudice shown by it, by the Selective Service Board or by the Appeal Board.

And the third is whether there is any basis in fact for the finding of the board, and there isn't any question under the facts there is a basis in fact for the finding of the Selective Service Boards that he should be put in 1-A.

The defendant has been asked in open court whether he would be willing to accept noncombatant service, which is the Medical Corps or something of that sort, and he refuses to do that.

The Court has no alternative. The defendant is sentenced to a term of eighteen months and remanded to the custody of the [105] Attorney General of the United States.

Mr. Brill: If the Court please, may I make a further motion at this time. I would like to make a motion for bail. I make the representation to the Court that we will in the time and manner required by law file an appeal in this matter. I feel the appeal would be prosecuted in good faith by myself as counsel for him. We intend to urge substantial questions of law and we remind your Honor of the

questions which were presented at this trial, namely, the question of confrontation of witnesses which we strenuously urged here, and I might call your Honor's attention to two cases involving that question, which are going to be heard on November 14 in which the trial court denied bail and the circuit court granted bail in both of these two cases. There are other substantial questions of law, all of which were outlined in the motion made for judgment and acquittal in this matter, and we strenuously urge that bail be allowed because the circuit court, if they should find there was an error of law, this man will have served time erroneously.

The Court: How do you feel about it?

Mr. Karesh: Your Honor has stated its findings. There is no substantial question on appeal. The rule requires bail only if there is a substantial question.

The Court: Well, there may be. For example, there isn't any question in my mind, but there may be a question involved [106] as to whether or not the basis in fact should be argued. If bail is allowed, what bail should it be. What is the bail now?

Mr. Brill: One thousand dollars.

The Court: That ought to be ample to keep the defendant within the jurisdiction.

Mr. Karesh: May I make this observation?

The Court: I don't want to keep this jury waiting.

Mr. Karesh: I just want to make one statement. I feel that in a Selective Service case where there is no question of a substantial question on appeal that to permit liberty pending appeal after sentence is

contrary to the spirit and intent of the law. This is a young man of draft age who is offered the opportunity for noncombatant service, who will not accept noncombatant service, to be permitted bail is contrary to the rule and I think would not be in the interest of the Selective Service. And if there is a substantial question, let the Circuit Court of Appeals do it. But I would urge your Honor, and none of the district Judges, and I say this respectfully, have been granting bail. True the Circuit Court has overruled the District Court on occasion. But I don't think bail would be proper because there is no basis in fact. There is the question of the sufficiency of the evidence, and indeed there is no question there.

The Court: Well, suppose you draw up, Mr. Brill, a statement so that I can study it as to what constitutes grounds [107] for bail and we will continue the matter and allow the defendant out pending the determination of that.

Mr. Karesh: I would have no objection to that. You are granting a stay of execution say for——

The Court: Say a week from today, to give Mr. Brill time to draw this up.

(Thereupon the matter of determining admission of the defendant to bail continued to Thursday, November 13, 1952, at 9:30 a.m.)

Certificate of Reporter

We, official reporter(s) and official reporter(s) pro tem, certify that the foregoing transcript of 108 pages is a true and correct transcript of the matter

therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ H. A. FOSTER,

/s/ W. A. CANNON. [108]

October 21, 1952

The Clerk: United States versus David Don Schuman, for decision.

The Court: Gentlemen, in this matter there was one witness, his name is Mr. Bonzani.

Mr. Karesh: Yes.

The Court: I have been considering the fact that certain questions asked of him were sustained; some of them should have been sustained and some of them, I think, should not have been sustained.

Therefore, I feel an opportunity should be given to the defendant's attorney to examine him further, if the defendant's attorney wishes to do that.

Mr. Karesh: May I at this time, your Honor, voice as very strenuously as I can a protest against such a reversal of ruling by your Honor, and I say that your Honor, and I say it in all respect, calling back a board member and permitting his questioning is running squarely in the teeth of the decision of the Supreme Court of the United States. And I should like to call to your Honor's attention and quote the language of Justice Rutledge in the Falbo case——

The Court: 320 U. S. 549.

Mr. Karesh: I would like to read you precisely

what the judge said in his concurring opinion, if I may. [2*]

The Court: Go ahead.

Mr. Karesh: This is what Mr. Justice Rutledge said in the Falbo case:

> "I concur in the result and in the opinion of the Court except in one respect. Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the Repeal Board which reviewed and affirmed the local board's order. And there is nothing to show that the Appeal Board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the Appeal Board's action. Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question. Accordingly I agree that the conviction must be sustained." [3]

And once more I make the assertion, your Honor, it is immaterial what occurred before the local

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

board, no matter what their mental processes might have been, because the local board's action was sustained by the Appeal Board, and the United States Court of Appeals for the Ninth Circuit has held, it is the law of this Circuit and I believe it to be the law of the land, that once an appeal is taken, anything that occurs before the local board becomes immaterial and incompetent. That is why the Congress set up the Appeal Boards to take care of any error or any prejudice which might have occurred before the local board.

Now, I say, your Honor, it would be wrong to call back the Chairman or member of the local board. I say this also to your Honor that these members serve without compensation and I don't believe that they should be called away from their business to testify upon a matter that is wholly immaterial.

Now, the only question before this Court is whether or not there is any basis in fact for the 1-A classification, and that is to be determined from the file. And if there is a basis in fact for the classification, there is nothing for this Court to decide.

Now, is there a basis in fact for this classification? I make the argument, because counsel filed without the permission of the Court a memorandum. Let me say this, your Honor, [4] that the burden rests upon the registrant. This is not a case where the burden is upon the Government to prove beyond a reasonable doubt that he should have been classified in 1-A. The burden is upon the Government only to show that he refused to submit to induction under the regulations. The burden is upon

the registrant to show that he should have been classified in a class other than 1-A and for a very cogent reason, your Honor, because as the preamble of the Selective Service Act and the Universal Military Training and Service Act states, this is a system of selection by boards of neighbors, and when a man does not go into the Armed Forces of the United States somebody else has to take his place.

Therefore, the burden is upon him to show that when he does not go in someone else takes his place, that that was just and that was right.

The Court: Is it your contention if there were in fact, and of course I don't mean to intimate there is, if there were in fact bias, prejudice and no other basis in fact for the classification by the first Selective Board, would it not be material?

Mr. Karesh: Now, so far as the first board is concerned—let us go to the first board. There could be bias, there could be prejudice, there could be no basis in fact. That is for the first board. But if an appeal is taken and there is a basis in fact for the classification by the Board of Appeal, [5] that is all that is necessary, because Congress intended that the mental processes of these men, sitting upon the boards and serving without compensation, shall not be explored. And I say it emphatically, and it is the law and the law of this Circuit and the law as announced by Mr. Justice Rutledge, that no matter what occurred before the local board it is immaterial where there is a basis in fact before the Board of Appeal to warrant the classification accorded.

That is why they set up these Appeal Boards.

Where else has there been set up a fairer system of protection to a registrant than under the Selective Service Act? One, they have a right of appearance before the local board after classification and a reclassification; and they have their right of appeal, and then they have a right, in the case a Board of Appeal member dissents, can go to the President of the United States.

The Court: I don't want to cut you short——

Mr. Karesh: Yes.

The Court: Mr. Brill, perhaps it won't make much difference to call him back. You want him called back?

Mr. Brill: Well, we, of course, felt it was material at the time we were questioning him when he was on the stand. I am not prepared to argue this matter now, I didn't know the question was going to be raised.

The Court: I raised it myself. It has been bothering [6] me for the last week.

Mr. Brill: But there are numerous cases, the Niznik case, for example, I don't have the citation, but I am sure counsel is familiar with it. Also the case in which the Circuit Court held that the man had not been accorded a fair trial because he was not permitted to show the bias and prejudice of the panel, the board at the personal hearing. They sent it back for a new trial, for further testimony, and when the further testimony of the new trial did not divulge a record different than that made originally, the Circuit——

The Court: Well, I think I would rather hear

the testimony. Gentlemen, what time would you like to have the matter heard?

Mr. Karesh: Anytime that is convenient.

The Court: When is it convenient to you, Mr. Brill? Would Friday at 10:00 o'clock be all right? Just for that one purpose, of reopening it for that purpose.

Mr. Brill: Friday, I think, would be all right, your Honor.

The Court: All right with you, Mr. Karesh?

Mr. Karesh: As I understand it the only issue now that is troubling the Court, assuming it is,——

The Court: I won't say, got a lot of other troubles.

Mr. Karesh: I mean in this particular case, for that one particular point? [7]

The Court: For the purpose of allowing Mr. Bonzani to take the stand. I sustained objections there that I feel that I went too far and I want to give the defendant's attorney an opportunity to ask those questions. If you have objections, you can make them.

Mr. Karesh: Your Honor, before your Honor does that, I don't like Mr. Bonzani to be taken away from his work, and may I say this, and I know your Honor has a jury and I will not be long——

The Court: All right.

Mr. Karesh: If this board member—if your Honor finds that there was prejudice, then you consider that that is to be justification regardless of the decision of the Board of Appeal, your Honor is

suggesting to Selective Service that Mr. Bonzani be stricken from the rolls?

The Court: Not passing in advance, I merely want Mr. Bonzani brought back and those questions that counsel wishes to ask him, you make your objections in the regular order and they may be sustained. I want a full opportunity be given; I don't think a full opportunity was given to examine Mr. Bonzani. I feel every party is entitled to it. I will assume the responsibility myself for calling him back. I would like to have either one or both of you gentlemen arrange to have Mr. Bonzani here at 10:00 o'clock on Friday, and if there are any questions you wish to ask him you may do so, and [8] if you want to object——

Mr. Karesh: Will your Honor give me permission, before he is called to the stand, to reargue this matter, before he takes the stand?

The Court: Yes, at that time we will have more time to argue about his taking the stand.

Mr. Karesh: Argue about calling him back.

The Court: I understand what you mean. The thing is, when a question is asked, that is the time for full opportunity for objection. We will be arguing in the concrete rather than the abstract.

Mr. Karesh: All right, Judge, we will have him here.

The Court: This matter then—will you arrange, Mr. Karesh, for his coming?

Mr. Karesh: Yes, I will tell him.

The Court: Have Mr. Bonzani here, and this

matter will be continued to Friday, October 24, at 10:00 o'clock.

Mr. Brill: Thank you.

Mr. Karesh: May I say this, your Honor: The memorandum that is filed by counsel, I don't know whether your Honor wants me to reply to that religious training and belief——

The Court: Glad to have all the help I can get. If you wish to make a reply I assure you I will carefully read it.

Mr. Karesh: Thank you, Judge.

Mr. Brill: I think the record should be cleared up. [9] Counsel made the statement that I filed it without permission of the Court. I made a trip out here and specifically asked the clerk to ask the Court's permission to file it, and as I understand it the Court granted permission.

Mr. Karesh: I didn't know it.

The Court: The clerk informs me we granted permission.

Mr. Karesh: All right.

The Court: If you want to file a reply brief I will be glad to have it, glad to have all the help I can get. It bothers me very, very much to have a young man 22 years old decreed a felon. If it has to be done, it has to be done. That is the situation. But I want to give him every possible opportunity.

All right, next matter, please. [10]

Friday, October 24, 1952, 10:00 A.M.

The Clerk: U. S. versus Schuman, further hearing.

Mr. Karesh: Ready.

The Court: All right, proceed, gentlemen. You wanted to call back this witness?

Mr. Karesh: The gentlemen is here.

The Court: Any further questioning which is proper by the attorney for the defendant and by counsel.

You come forward, Mr. Bonzani.

The Clerk: You have already been sworn. Please take the stand.

MR. JOSEPH BONZANI

called as a witness by the defendant, previously sworn.

Direct Examination

By Mr. Brill:

Q. Mr. Bonzani, who called you to appear today, to come to court?

A. I received a telephone call from Selective Service that the judge wanted to see me.

Q. That the judge wanted to see you?

A. Yes.

Q. Mr. Karesh called you? A. No.

Q. Have you discussed your testimony to be given this morning [11] with Mr. Karesh?

A. No.

Q. Haven't discussed it at all? Have you talked to Mr. Karesh before taking the witness stand?

A. Just now.

(Testimony of Joseph Bonzani.)

Q. Did he make any suggestions to you as to what your testimony should be?

Mr. Karesh: Objected to, your Honor, as incompetent, irrelevant and immaterial. Furthermore, he is impeaching his own witness.

The Court: That is true. It is perfectly proper for counsel to talk to witnesses in order to find out what they know. Nothing wrong in that.

Mr. Brill: The question was whether or not Mr. Karesh made any suggestions as to what he should say.

Mr. Karesh: He is impeaching his own witness.

The Court: I will allow the question. What was the answer?

The Witness: What was the question again?

Q. (By Mr. Brill): Did Mr. Karesh suggest to you what your answers to the questions this morning should be?

A. Well, he just pointed out that—he said while I was on the stand the other day there were three witnesses, three board members present; the records only disclose there were two. [12]

Q. Does that change your recollection at all now?

A. No.

Q. However, you feel that the record would disclose the true situation, would it not?

A. That's right.

Q. And the record does indicate that just you and Mr. Dooley were present at that hearing?

A. That's right.

Q. You do have a recollection, however, I be-

(Testimony of Joseph Bonzani.)

lieve you said that the record was written, a transcript of the testimony was made, a shorthand reporter took notes at the hearing and subsequently a transcript of the testimony of that hearing was made, isn't that right?

A. Wasn't a shorthand reporter, it was Miss Eubank made the record, she took it in shorthand.

Q. At least notes were made in shorthand and later transcribed? A. That's right.

Q. I would like to read to you something that I think is Government's Exhibit No. 18, question by Mr. Dooley.

"Do you wish us to consider your classification on the conscientious objection or on the grounds of being a minister?"

Mr. Karesh: What page is that?

Mr. Brill: I'm sorry, page 8 of the——

Mr. Karesh: What lines? [13]

Mr. Brill: It isn't numbered. Down, two-thirds of the way down.

"Registrant: Both grounds, I am opposed to all forms of service.

"Mr. Dooley: Present your side of the case.

"Registrant: I would like to call your attention to the affidavits in my file (going through his file) if I can find them.

"Mr. Dooley: I have read everything in your file, the statement signed by Harry G. Whitcomb and the ones signed by various others. State your basis for your claim as conscientious objector.

"Registrant: I am conscientiously opposed by

(Testimony of Joseph Bonzani.)
the belief I have in the bible and Jehovah's Witnesses to serve in the Armed Forces.

"Mr. Dooley: Don't you feel you have an obligation to your country?

"Registrant: Do you personally believe in the bible?

"Mr. Dooley: There isn't any question of that.

"(Registrant here quoted the bible.)

"Registrant: I respect the Government of the United States, I want to do everything the Government wants except fight. [14]

"Mr. Dooley: If a man walked up to you and hit you, would you hit him back?

"Registrant: I don't know.

"Mr. Dooley: If the enemy invaded our shores?

"Registrant: I would not shoulder a weapon.

"Mr. Dooley: You know, during the war the enemy was very cruel to persons of your extraction, that could very well happen again, what would you do?

"Registrant: Jehovah's Witnesses were shot to death because they would not kill American soldiers.

"Mr. Dooley: What do you think should be done in the case of an emergency?

"Registrant: I don't believe killing is the right thing to do, I would render unto Caesar, and render to God what belongs to God.

"Mr. Dooley: Would you salute our flag?

"Registrant: I have objections.

(Testimony of Joseph Bonzani.)

"Mr. Dooley: Would you take off your hat?

"Registrant: I would show proper respect.

"Mr. Dooley: Anything further to say?

"Registrant: I hope you will have an accurate summary in my file, and if you desire any further information or wish to speak with me again I will be happy to appear.

"(Registrant was dismissed and interview terminated.) [15]

"Summary: Primary vocation is student. Continued in 1-A. Request denied for classification as ordained minister and conscientious objector."

Q. (By Mr. Brill): Subsequent to that the Board, pursuant to this hearing, did deny the registrant his claim as a conscientious objector, isn't that correct? A. Prior to this hearing?

Q. No, subsequent to it.

A. Oh, yes, that is correct.

Q. Now, will you tell us what the basis of your vote was finding that the registrant was not a conscientious objector?

Mr. Karesh: To which we object as incompetent, irrelevant and immaterial. Furthermore, we say that the action of the Appeal Board superseded the action of the local board and the decisions are in this Circuit as to the latter proposition cannot be disputed, and I have the language from the decision. No matter what the basis of the decision was—let us do it in reverse. One, no matter what the basis of the decision was, it is immaterial, you can't explore his mind and go to his reason. Two,

(Testimony of Joseph Bonzani.)

the action of the Appeal Board superseded the action of the local board.

The Court: Objection overruled. Let him answer.

Mr. Brill: I think the Court has ordered you to answer the question.

The Witness: Well, the Board, in deciding his case, felt [16] that he was not a student minister, that he was not a regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector.

Q. In other words, as I understand, because you found that he was not, had not attended a regular divinity school and that you could not find him to be a minister, you, therefore, found there was no basis for his claim as a conscientious objector, is that correct?

The Court: Well——

Mr. Karesh: That wasn't his answer.

The Court: That is not the statement he made.

Mr. Brill: Well, I should like to have the statement read back again, if I may. I may have misunderstood it.

(Answer read by the reporter.)

Q. (By Mr. Brill): I would like to ask, repeat the question I asked.

The Court: First, it is cross-examination of your

(Testimony of Joseph Bonzani.)

own witness. He has answered your question and he has given the reason, and that's all. That's it. Nothing to explain any further. You asked the question, he has given you the reason.

Q. (By Mr. Brill): That was the basis upon which you cast your vote, is that correct? [17]

Mr. Karesh: For what action, counsel?

Mr. Brill: For the determination of the claim as a conscientious objector.

Mr. Karesh: Not as a minister?

The Court: Now, you see, he cast his vote as 1-A, that covers everything. You also considered whether he was a conscientious objector?

The Witness: When we considered his case we considered all the actions.

Mr. Brill: Well, if the Court please, there were two bases for his claim for exemption; one was that as a minister, a regular minister; the other as a conscientious objector.

The Court: The witness says he considered them both.

Mr. Brill: I have restricted my questioning to that portion of the transcript which indicates that the Board split up their inquiry, because where I started they asked him to state his case as a conscientious objector. That is on page 8 of the transcript.

Mr. Karesh: There was language before that he used, counsel, asking him to repeat it.

The Court: Well, the entire transcript is in evidence.

(Testimony of Joseph Bonzani.)

Mr. Brill: Yes, that's correct.

The Court: And if you want to read it to the Court you may. If you want this witness to read it to the Court, he will.

Mr. Brill: I think the Court—— [18]

The Court: I don't know what else we can do except hear the record. Now, you stated that based upon his observation, evidently of the registrant, he had the opportunity that the Court hasn't, he had the opportunity of examining the registrant, observing his demeanor on the stand, method of his answering questions and everything connected with that, and from the entire questioning, considering all the rules of observation of witnesses, considering the question of minister, considering the question of conscientious objector, he evidently came to the opinion that he should be in 1-A. Is that about it?

The Witness: That is correct.

The Court: Without asking the witness apparently that is the situation. Now, what else would you like to ask him?

Q. (By Mr. Brill): Can you tell us whether or not the regulations provide that a regular minister must be one who attended a recognized divinity school?

Mr. Karesh: Now, your Honor, we object to this as a very unfair line of questioning. It is not fair to place a witness on the stand to attempt to embarrass him to find out how much of Selective Service regulations he knows or how much he does

(Testimony of Joseph Bonzani.)

not know. The Governor of the State of California, the President, felt that he had enough knowledge, he was appointed, serves without compensation. He is presumed to know these regulations and based upon his knowledge of the regulations, based upon the evidence he put him in 1-A, and [19] I don't think this line of questioning should be pursued, and he is your own witness.

The Court: If he remembers what the regulations are now, changed from time to time. I presume he was acquainted with the regulations at the time, is that what you want to know?

Mr. Brill: Find out what his knowledge of the regulations were at the time he considered this classification.

Mr. Karesh: To which we register another objection, please, that it is immaterial what happened there. The Appeal Board was the one that was the ultimate authority, that is why we have Appeal Boards, to take care of any errors involved. In this case, of course, there wasn't.

The Court: Well, perhaps the witness wants to refresh his memory by looking at the regulations. Now, I have some general knowledge of the regulations, but if you were to ask me at this moment just exactly how the regulations read, I would have to study it, look it up myself. He is supposed to remember now what the regulations were at that time?

Mr. Brill: If the Court please——

The Court: I can't see the materiality.

(Testimony of Joseph Bonzani.)

Mr. Brill: The materiality of this, when a registrant appears before a Board such as this—I realize they serve without compensation—but the fact is that they are passing upon the lives of individuals who appear before them. When the individual appears before them he has a right, a [20] constitutional right to have this determination made in accordance with the regulations.

Now, if the hearing officer is under a misapprehension as to the requirements or qualifications for any particular claim of exemption, then he has not had the fair hearing he is entitled to, that is, the registrant has not had a fair hearing. Let us assume, for the sake of argument, that, and I think as the record will bear me out, that the determination of conscientious objectors was made, particularly in this case, on the basis of the fact that this registrant did not attend a recognized divinity school, and I think when you honestly analyze the answer given to that question there can be no other conclusion but that that was the basis upon which they refused to give him a conscientious objector classification.

Mr. Karesh: May I——

Mr. Brill: May I finish?

Mr. Karesh: Your Honor, I am going to object to this line of questioning again, going to object to this line of harrassment. The man did not testify—in effect, you confused him, your own witness—he didn't say on the basis of fact that he was a student——

(Testimony of Joseph Bonzani.)

(Both counsel talking at once.)

Mr. Brill: Call upon the Court to make an orderly trial of this matter.

Mr. Karesh: Then you be orderly with this witness. [21]

The Court: As we understand now, Mr. Brill is arguing the matter, so go ahead with your argument, and he has a right to argue the matter as fully as he wishes.

Mr. Brill: I was pointing out that the registrant has a right to be heard by persons who properly determine the evidence before them. Now, it is true there has been an appeal. I will point out to your Honor what happened by the Appeal Board, according to the record here, but in the first place, the regulations give him a right to a fair hearing. Now, a fair hearing means a hearing before a man who understands the regulations so that he may pass upon the evidence before him and classify the registrants in accordance with the regulations as they pertain.

Now, the regulations with reference to ministers are broken down into several classes. There are ordained ministers, there are regular ministers. Regular ministers are not required to attend a recognized divinity school. Now, let's say that this witness, or this Board Member, understands that that is the determining factor. That would not be a fair hearing if the registrant claims to be a regular minister, the same as if he claimed to be a conscien-

(Testimony of Joseph Bonzani.)

tious objector, and the refusal to determine or find a determination that he was, based upon the question of where he went to school or what color tie he wore.

Now, we have a right to determine whether or not this man, who was a Board Member, knew those regulations and applied [22] them properly, and I think the cases bear us out. We submit that is the purpose for these questions.

Mr. Karesh: I once more assert, your Honor, the cases do not bear him out. There are myriads of cases that you can't explore the mental processes. The Supeme Court said if there is any basis in fact for the classification, that's it. And there is ample basis in fact here both by the local board and the Appeal Board to not give him a 4-D, because he was not engaged full time. That is the best as distinguished from the last war, and the decisions upon which you rely; and second, he was not a conscientious objector by reason of religious training, as well as belief. Let us go into his training that he had.

The Court: Well, suppose you ask your questions and I will try to pass on them. Would you like to look at the regulations as they were at the time, want to do that?

The Witness: I would like—may I have the question?

The Court: Have you got a copy of the regulations as they were at the time he passed on them? Got a copy of the regulations?

(Testimony of Joseph Bonzani.)

Mr. Karesh: Here are the regulations.

The Court: The witness says he would like to see what the regulations were at that time.

Mr. Karesh: That is just a minister.

The Court: That is considering a minister. Where are the [23] regulations concerning conscientious objection. Ministers is on page 5, minister of religion. Where are the provisions for conscientious objectors?

Mr. Karesh: I have it in this brief I just filed. Here are the conscientious objector provisions, both of the Act and the regulations that follow.

The Court: "Class IV-D: Minister of Religion or divinity student. (a) In class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

"When used in this title——"

(Testimony of Joseph Bonzani.)

Section 16 of Title I of the Selective Service Act [24] of 1948 contains in part the following provisions:

"Sec. 16. When used in this title * * * the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rights and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect or organization as a regular minister.

"The term 'regular or duly ordained minister of [25] religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in

(Testimony of Joseph Bonzani.)

accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

That is for a minister. Now, for a conscientious objector, title 50 United States Code, Section 456-J provides as follows:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, [26] sociological, or philosophical views or merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board, shall, if he is inducted into the Armed Forces under this title, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-combatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if

(Testimony of Joseph Bonzani.)

such claim is not sustained by the local board, be entitled to an appeal to the appropriate Appeal Board. Upon the filing of such appeal, the Appeal Board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing if the objections are found to be sustained, recommend to the Appeal Board that (Fig. 1) if the objector is inducted into [27] the Armed Forces under this title, he shall be assigned to non-combatant service as defined by the President, or (Fig. 2) if the objector is found to be conscientiously opposed to participation in such non-combatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the Appeal Board that such objections be not sustained. The Appeal Board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

(Testimony of Joseph Bonzani.)

Part 1622.20 of Selective Service Regulations read as follows:

"Class IV-E"—this is the old 4-E, now 1-O, I presume it is the same.

Mr. Karesh: That was applicable at the time.

The Court: At the time.

"Conscientious objector opposed to both combatant and non-combatant and service. [28]

"(a) In Class IV-E shall be placed any registrant who, by reason of religious training and belief, is found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and non-combatant training and service in the Armed Forces."

Now, in considering whether he was a minister or as a conscientious objector, they are two different things, you understand that?

The Witness: Yes.

The Court: Now, what was the question?

Mr. Brill: Well, as I recall, I asked the witness to tell us what his understanding of the regulation was at that time as to the facts to be found in order to find that the registrant was a minister or—yes, a minister.

Mr. Karesh: We renew our objection, your Honor.

The Court: Well, answer the question.

The Witness: Well, the Board, in considering his case, felt that he was not a full time minister

(Testimony of Joseph Bonzani.)
as a vocation. He was probably, as an avocation, acting as a minister.

Q. (By Mr. Brill): You say he was acting as a minister as an avocation?

A. Well, part time, or maybe some duties, some lectures, something like that, but not a full-time minister as a [29] vocation.

Q. Now, because of the fact that he was not spending his full time as a minister I assume that is what you are telling us? A. That's right.

Q. Now, what was the basis upon which they found that he was not a conscientious objector?

Mr. Karesh: Your Honor, we renew our objection. The files speak for itself. We can't go into the mental processes of this person here, said he had no prejudice against the registrant——

Mr. Brill: Just a moment, he hasn't said any such thing. That question wasn't asked.

Mr. Karesh: I thought it was asked.

The Court: According to the testimony, it was part of his testimony, that is all. Overruled. Let him answer. What was the question?

Q. (By Mr. Brill): The basis upon which you found that he was not a conscientious objector?

A. Well, feeling that he was not a full-time minister——

The Court: You can be a conscientious objector without being a minister.

The Witness: Yes.

Mr. Brill: Your Honor, I am going to object to the Court's advising the witness. I think the wit-

(Testimony of Joseph Bonzani.)

ness should be [30] allowed to answer the question.

The Court: All right. I think you are correct. Go ahead and answer the question.

The Witness: The Board felt that not being a full-time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection.

Mr. Brill: I think I will ask no further questions.

The Court: Any questions, Mr. Karesh?

Mr. Karesh: Yes.

Cross-Examination

By Mr. Karesh:

Q. In determining whether or not this man was entitled to a classification as a conscientious objector, you had the whole file before you, is that not correct? A. That's correct.

Q. And you went into his religious training and belief, is that correct? A. That's right.

Q. And you determined his religious background, is that correct? A. That's right.

Q. Your testimony was not, your determination was not based upon the fact that he was merely a student minister?

Mr. Brill: Just a moment—— [31]

Mr. Karesh: He isn't my witness, he is yours.

Mr. Brill: I would like to make my objection.

(Testimony of Joseph Bonzani.)
Mr. Karesh, I don't like to be instructed by you. I have been in court plenty of times.

Mr. Karesh: So I am told.

Mr. Brill: Like to make my objection on the ground that this is leading and suggestive.

The Court: It certainly is, and cross-examination, it is intended to be leading and suggestive under the law. Nothing wrong with a leading and suggestive question under cross-examination.

Mr. Brill: Make our objection on that ground.

The Court: Overruled.

Q. (By Mr. Karesh): Isn't it a fact, Mr. Bonzani, that in determining whether or not he was entitled to a claim as a conscientious objector, not as a minister now, but as a conscientious objector, you took into consideration all of his religious training, is that right? A. That's right.

Q. And his religious, so-called religious background, is that correct? A. That is right.

Q. Your decision wasn't based upon the fact that he was only a student minister, distinguished from an ordained minister, in determining he was a conscientious objector? [32]

Mr. Brill: Object to this line, entire line of examination on the ground it is leading and suggestive. The witness has been shown to be an employee of the Government, he is an adverse witness, and we don't feel that the questioning of this witness should be in a narrative form calling for a yes or no answer by the witness. Object to that.

Mr. Karesh: I don't know of any provision

(Testimony of Joseph Bonzani.)

that he is called as an adverse witness in a criminal proceeding.

The Court: I don't know how you can call him an adverse witness when the Court has allowed the asking of leading questions, but certainly under cross-examination you can't stop asking leading questions. If you want to object on the ground that the question is complicated, that it is indefinite, something of that kind, you may, but merely cross-examining on the points you brought out merely because the answers don't suit you is no ground for objecting.

Mr. Brill: It isn't that the answers don't suit me, it is upon the form of the question, and upon the further ground we are making our objection to this entire line of examination on the ground it calls for an opinion and conclusion of the witness.

The Court: Well, under direct examination of the witness you asked him, you wanted to know what his opinion was and what conclusion he based it on. Overrule the objection. You may answer the question. Ask the question again. [33]

Q. (By Mr. Karesh): In considering whether or not he was entitled to a conscientious objector classification you didn't base your decision only on the fact that he was a student minister of Jehovah's Witnesses, as distinguished from a full-time minister, did you? A. No, sir.

Q. And the whole file was before you, is that right? A. Correct.

(Testimony of Joseph Bonzani.)

Q. You have any prejudice against him because he is a Jehovah's Witness?

A. None whatsoever.

Q. And prejudice against him because at one time he was Jewish and turned Jehovah's Witness?

A. No.

Mr. Karesh: That is all.

The Court: Any further questions of this witness?

Mr. Brill: No further questions.

Mr. Karesh: No questions.

The Court: You have had full opportunity to examine the witness?

Mr. Brill: Pardon?

The Court: Any questions you want? I want you to have a full opportunity to examine him so there won't be any question about that.

Mr. Brill: We appreciate that, your Honor. I would like [34] to say this for the record: That the right of examination of the witness such as this depends to a great extent upon the element of surprise. We feel that the registrant's and the defendant's case has been prejudiced in the manner in which—the witness was called originally by us under subpoena. Questions were put to the witness. He was refused, or we were refused the right to proceed with questioning. It then was put over until today. I realize there was no malice aforethought of any kind, but the right of examination depends upon, as I see it, the element of surprise, and we feel that it has been prejudicial to the

(Testimony of Joseph Bonzani.)

defendant in this case to allow this witness to go from court and be called back by the plaintiff, the prosecution in this case.

On the question of the calling back of the witness, as I understood the Court's direction, it was made to Mr. Karesh, the United States Attorney's office, to have him back here. Now, I suppose that technically he originally was our witness and this was a matter of convenience, but I think I have stated our position for the record.

The Court: Just a moment. The Court will answer that. You have made many mistatements in your statement, Mr. Brill. In the first place, the element of surprise does not exist here. From the testimony before the Court no one has talked to this witness since the last time with the exception for a moment that Mr. Karesh spoke to him this morning. He told you [35] what the conversation was.

In the second place, Mr. Karesh did not suggest that this witness be called, nor did I discuss the matter at any time with Mr. Karesh in your absence. The only discussion was had with Mr. Karesh was in open court in this matter, and you were present. And Mr. Karesh did not ask that the witness be brought back, the Court did, merely because the Court believed, wanted to give you full examination of this witness, full opportunity to examine.

The Court still is in great doubt as to whether or not it is proper to ask this witness the questions

(Testimony of Joseph Bonzani.)

which you asked the witness this morning. But the Court determined, permitted you to ask, gave you broad latitude.

Now, I cannot see in any way how the defendant is prejudiced at all by the fact that the witness has been called back for further questioning and the answers given us by the witness today are substantially the same as given by the witness the other day under cross-examination.

It is very clear that he examined the whole record, and unless this witness has shown some reason not to have paid attention to the record—he saw the witness, he saw the registrant, he talked to him personally, he arrived at certain conclusions as to whether or not be was a conscientious objector under the rules. He hasn't been impeached in any way. I wanted to give you every opportunity to examine him, to show [36] some bias or prejudice of any kind. None has been shown.

Now, anything further you wish to ask of this witness?

Mr. Brill: Nothing at this time, your Honor.

The Court: Anything further, Mr. Karesh?

Mr. Karesh: Nothing.

The Court: Mr. Bonzani, you are now excused and you may go home now—you may go to work.

(Witness excused.)

The Court: Gentlemen, any other witnesses either counsel desires to present? Mr. Karesh?

Mr. Karesh: No.

The Court: Mr. Brill? Is there any argument either counsel wishes to present now in addition to the argument given the other day? Not the same argument, but additional arguments of any kind?

Mr. Brill: I feel that I would like to point out to your Honor the record here, I think it is Government's Exhibit No. 24, 25—we have the exhibits here—no, it is not 25. In any event, it is a document dated November 1, 1951, and I'm sure it is in the record, and it would be—it is called individual appeal record of the local board 38. Do you know what the number is? A young man from my office, who is here with me, kept the notes in his own brief case and I neglected to take them with me.

The Court: What was the date of the [37] paper?

Mr. Brill: November 1, 1951, and called Individual Appeal Record.

The Court: What is the number?

Mr. Brill: I don't know the exhibit.

Mr. Karesh: Your Honor may have my copy.

Mr. Brill: This document clearly shows that the appeal taken by him and considered by the Appeal Board, according to the official minutes of the action of the Appeal Board, indicates that the registrant requested 4-D classification, as minister of the Jehovah's Witnesses, and no action, official action of any kind was taken by the Appeal Board itself on the question of conscientious objection. Now, it is true that there are other documents indicating that there was a hearing and that there was a recommendation by the Department of Justice.

But there was no official action taken by the Appeal Board itself other than as indicated by the minutes of action of the Appeal Board, which indicates that by a vote of three to nothing the classification was made 1-A upon the consideration of an appeal in which the registrant requests 4-D classification as a minister of Jehovah's Witnesses, but it is silent as to the consideration of the question of conscientious objector. I felt the Court ought to know that.

The Court: What about that?

Mr. Karesh: Your Honor, I can explain that. That's the clerk, in sending the record to the Board of Appeal, simply [38] said registrant requests a 4-D classification, minister, Jehovah's Witnesses. However, you will notice the Appeal Board did not pay any attention to that. If they had they never would have sent the file to the hearing officer for the reviewing of his claim as a conscientious objector. And Your Honor will note the inquiry on the back of the questionnaire.

It reads:

Appeal Board Panel No. 3 received this file and determined that the registrant should not be classified in either 1-A or C-O I may say at the time he had his hearings, the change from the 4-E to the 1-A, you will notice the Appeal Board Panel 3 reviewed this file and determined that the registrant should not be classified 1-AO, but 1-A, by a vote of three to nothing under the circumstances set forth in the sub-paragraphs of Section 2625.

But of course, they sent it from——

Mr. Brill: That is just a memorandum.

Mr. Karesh: The decision.

Mr. Brill: That is a memorandum made by the clerk of the local board as to what the steps were, the chronological steps.

Mr. Karesh: Your Honor, that is not correct.

Mr. Brill: It is not official action by the Appeal Board. [39]

Mr. Karesh: That is the decision of C. E. Petty, Chairman of the Board of Appeal.

The Court: That is a determination of the Appeal Board, isn't it?

Mr. Karesh: Certainly.

The Court: Goes to the Department of Justice, a hearing is had, and reported back to the Department of Justice and goes back to the Appeal Board and the Appeal Board——

Mr. Karesh: Renders another decision.

The Court: Renders a decision, isn't that correct?

Mr. Brill: That is correct.

The Court: Their decision was that——

Mr. Karesh: 1-A.

The Court: It went farther than that. He said the Appeal Board reviewed the file, determined the registrant should not be classified 1-AO or 1-O.

Mr. Brill: And completely omits the question of minister.

The Court: Signed by—no—Oh, I see.

Mr. Karesh: Then, your Honor, I might as well explain those regulations, if the appeal involves a question of conscientious objection they make first

a determination as to the conscientious objector, and if they aren't going to give a CO to this man they send it to the hearing officer and the hearing officer then comes back and then they make their final determination. [40]

The Court: Mr. Brill points out this statement doesn't say—this time the objection is not they left out conscientious objector, this time they left out the minister.

Mr. Brill: Took an appeal on that ground, that is what the minutes indicate, that he took an appeal on the ground he was a minister, and instead of determining the question of minister they determined the question of conscientious objector and the minister is up in the air.

Mr. Karesh: Now, your Honor, it refers to a particular paragraph in the regulations. I don't want counsel to trick the Court, I don't think you can.

Mr. Brill: Mr. Karesh, I think that is slanderous.

Mr. Karesh: Well, I am not so sure. You know the regulations, counsel, you have had experience in draft trials.

Mr. Brill: I don't like you to use that language.

The Court: Never mind.

Mr. Karesh: I will repeat it.

The Court: In all fairness to Mr. Brill, Mr. Brill is making, it is his duty to present all these things to the Court and the Court will consider it.

Mr. Karesh: I may say, your Honor, counsel——

The Court: Confine yourself to the case.

Mr. Karesh: Counsel is very familiar with the Selective Service regulations and counsel knows if the question involves the claim of conscientious objection they first make the [41] determination as to the conscientious objection. If that determination is adverse to the registrant, it is sent on to the hearing officer and it comes back and on the basis of the entire record they make their final determination whether 1-A, 1-O, or 1-AO, and consider everything as a hearing de novo.

Mr. Brill: Then you show the Court where the action determines the question of his appeal from their refusal to give him a classification as a minister.

Mr. Karesh: There is no requirement that the Board say that he is not entitled to 4-D, 3-A, 4-E, 1-AO, 1-B, 1-C, 1-D; the 1-A is a denial of everything.

Mr. Brill: We are not going to enter into any banter with you, Mr. Karesh.

Mr. Karesh: I don't consider it banter.

The Court: Well, anything else anybody else wants to present?

Mr. Karesh: I just want to say one thing, your Honor: These people who talk about due process have had due process, and I ask your Honor to remember, as I know your Honor will, that this is a Selective Service system and that when somebody doesn't go somebody else took their place.

The Court: Anything else, gentlemen?

Mr. Brill: Submit the matter.

The Court: Well, the Court practically sits in

this case almost like the Court of Appeal over the District Court. [42] Findings of fact, unless they are arbitrary or wilful or biased or prejudiced, must be accepted by this Court.

There has been no showing at all of any bias or prejudice or motive on the part of the members of the Draft Board, no showing has been made there is anything the matter with them at all.

Now, as to whether or not the rules have been complied with, as to whether he had a hearing required by law—there is no showing that he didn't have all the hearings required by law and all the notices required by law, whether there is no basis at all for the classification.

The question before the Court is not whether the preponderance of the evidence would be in favor of a conscientious objector; the Court is not permitted under the laws to indulge in that. All this Court has to decide is as to whether or not there is any basis in fact whatsoever, and from all of the evidence presented there is no conclusion that the Court can come to except there is a basis in fact.

It might very well be, if this Court were sitting on a Board—as a matter of fact, I did sit on a Board many years ago. Many of these cases I found for exemption as a minority member, but I am not permitted to do that now in this case, and the law has to be followed.

It is therefore the duty of this Court and the Court does find the defendant guilty. [43]

Now, would you like to have this matter referred

to the probation officer for a pre-sentence investigation and report?

Mr. Brill: Yes, your Honor, I would.

The Court: All right. Now, what date shall we set this down for?

Mr. Karesh: If your Honor would set it at 9:30, because there is usually a trial.

The Court: Two weeks from today would be as good as any other day, gives the probation officer time. The defendant will be continued on bail.

Mr. Karesh: No objection, your Honor.

Mr. Brill: That date is——

The Court: Friday, November 7.

Mr. Karesh: 9:30, your Honor?

The Court: This matter will be continued until Friday, November 7, at 9:30 a.m., for the sentencing of the defendant. He is continued on bail. Probation officer will make a pre-sentence report at that time.

Anything further before the Court?

The Clerk: Nothing further at this time, your Honor.

The Court: Now at recess until 2:00 o'clock.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 44 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ RUSSELL D. NORTON. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case, and that the same constitute the record on appeal herein as designated by the attorney for the appellant:

Indictment.

Minutes of September 10, 1952.

Minutes of September 24, 1952.

Waiver of jury trial.

Minutes of October 17, 1952.

Minutes of October 24, 1952.

Minutes of November 7, 1952.

Judgment and commitment.

Notice of appeal.

Order for release on bail pending appeal.

Order extending time for filing and docketing record on appeal.

Designation of record on appeal.

Reporter's transcript for October 17, 1952, and November 7, 1952.

U. S. Exhibits 1 to 32, inclusive.

In Witness Whereof I have hereunto set my

hand and affixed the seal of said District Court this 21st day of January, 1953.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13692. United States Court of Appeals for the Ninth Circuit. David Don Schuman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 21, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13692

DAVID DON SCHUMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS RELIED ON

Upon the appeal the appellant will rely upon the following points:

I.

That the evidence is insufficient to sustain a conviction for a violation of the Selective Service Act of 1948 as amended, and that the trial judge committed error in not granting the motion for judgment of acquittal made at the close of all the evidence.

II.

The undisputed evidence shows that the 1-A classification given appellant is arbitrary, capricious and without basis in fact, and that therefore the trial judge committed error in rendering a judgment against appellant and failing to acquit him.

III.

The trial judge committed error in failing to hold that the local draft board denied appellant his rights secured by the Act and Regulations, by fail-

ing to follow the definition and standard set up by the Selective Service Act, Section 16, Title I, as amended, for a determination of who is a minister of religion.

IV.

The trial judge committed error in failing to hold that the local draft board denied appellant his rights secured by the Act and Regulations, by failing to follow the definition and standard set up by the Selective Service Act for determination of who is a conscientious objector.

V.

The trial judge committed reversible error in failing to hold that the draft board did not have any basis in fact for the denial of the claim made by appellant for classification as a conscientious objector opposed to both combatant and noncombatant service.

VI.

The trial judge committed reversible error in failing to hold that the draft board denied appellant due process of law, in that the Board did not have any basis in fact for the denial of the claim made by appellant for classification as a conscientious objector.

VII.

The trial judge committed reversible error in failing to hold that the appeal board denied the appellant due process of law by acting upon a recommendation of the Hearing Officer appointed by the Department of Justice, which recommenda-

tion was in excess of the jurisdiction of such Hearing Officer as defined by the Selective Service Act.

VIII.

The trial court committed reversible error in failing to hold that the Act and Regulations, as construed and applied in this case, deprived the appellant of his constitutional rights guaranteed to him by the Fifth and Sixth Amendments, in that he was convicted without the opportunity of being confronted with witnesses that testified against him through the secret F.B.I. report used by the Department of Justice Hearing Officer in his determination.

It is desired that the entire record of testimony, motions and rulings of the Court be printed in this matter.

Wherefore, appellant prays that the clerk file the above statement of points and designation of record as required by the Rules.

Respectfully submitted,

/s/ J. H. BRILL,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed April 9, 1953.

No. 13,692

IN THE

United States Court of Appeals
For the Ninth Circuit

David Don Schuman,

Appellant,

vs.

United States of America,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

John H. Brill,
1020 Mills Building, San Francisco 4, California
Attorney for Appellant.

FILED

JUL 15 1953

PAUL P. O'BRIEN
CLERK

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1 Timothy 4:12 44

Century Dictionary 28

Cyclopedia of Biblical, Theological, and Ecclesiastical Literature, McClintock and Strong, New York, Harper & Bros., 1880 20

Syriac New Testament, Murdock's Translation 38

Webster's New International Dictionary of the English Language, 2nd Edition, Unabridged, 1950, page 2854 26

White, The Colporteur Evangelis, Mountain View, Calif., 1930 39

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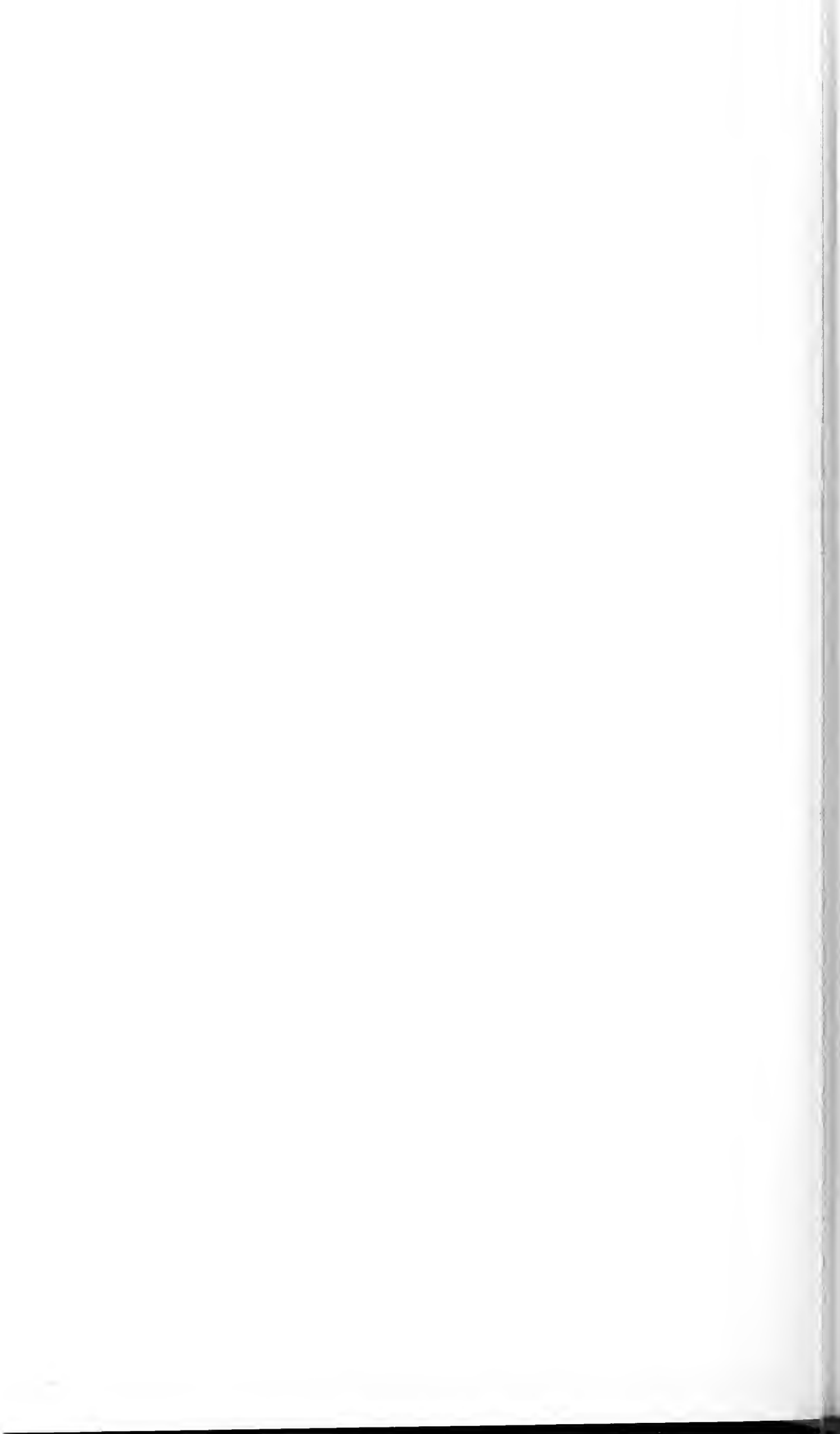

No. 13,692

IN THE

United States Court of Appeals
For the Ninth Circuit

David Don Schuman, *Appellant*, vs. United States of America, *Appellee.*	

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. (10-11)[1]

The District Court made no findings of fact or conclusions of law. No opinion of the Court was rendered. The Court merely found the appellant guilty as charged in the indictment. (155) Title 18, Section 3231, United States Code, confers jurisdiction in the

[1]Numbers appearing herein within parentheses refer to pages of the printed transcript of record filed herein.

District Court over the prosecution of this case. The indictment charged an offense against the laws of the United States. (3-4) This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed within the time and in the manner required by law. (11-12)

STATUTES AND REGULATIONS INVOLVED.

The indictment was returned pursuant to the provisions of Section 12(a) of Public Law 759, 80th Congress, Second Session (50 U. S. C. 462(a), 62 Stat. 622).

Section 6(g) of Public Law 759, 80th Congress, Second Session, reads as follows:

> (g) Regular or duly ordained ministers of religion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools. or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title. (50 U. S. C. 456(g), 62 Stat. 609)

Section 16(g) (1), (2), (3) reads as follows:

> (g)(1) The term "duly ordained minister of religion" means a person who has been ordained,

in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization. (50 U. S. C. 466(g) (1), (2), (3), 62 Stat. 624)

Section 1622.19 of the Selective Service Regulations provides:

> § 1622.19 *Class IV-D: Minister of religion or divinity student.* (a) In Class IV-D shall be placed any registrant:
>
> (1) Who is a regular minister of religion;
>
> (2) Who is a duly ordained minister of religion;
>
> (3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
>
> (4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been preenrolled. (32 C. F. R. 797)

Section 1624.2 of the Selective Service Regulations reads as follows:

> § 1624.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).
>
> (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have

been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary. (32 C. F. R. 802)

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

Section 1626.25 of the Selective Service Regulations reads as follows:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and

by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to non-combatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than Class I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class IV-E. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class IV-E, but does find that the registrant is eligible for classi-

fication in Class IV-E, it shall place him in that class.

(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class IV-E or in Class IV-E, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice. * * *

(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

STATEMENT OF THE CASE.

The indictment charged the appellant with a violation of Section 12(a), Universal Military Training and Service Act, 50 U. S. C. App. 462(a). It was

alleged that after registration and classification, defendant was required to report for induction and that he did report for induction and "did on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the armed forces of the United States as provided in the said Selective Service Act of 1948, and the rules and regulations made pursuant thereto". (4) The appellant was arraigned. (5) He pleaded not guilty. (5-6) Trial by jury was waived and he consented to trial to the court. (6) The case was called for trial on October 17, 1952. (7) Evidence was received (16-101) (126-156) and the cause taken under submission and continued until October 21, 1952. (7-8) On October 21, 1952 the trial was again continued for further testimony to October 24, 1952. (8) A motion for judgment of acquittal was made at the close of the evidence. (101 to 112) There appears to be no ruling on the motion in the record, however, the defendant was found guilty. (155) The Court sentenced the appellant to eighteen months in the custody of the Attorney General. (10-11) Judgment and commitment were entered in the Court below, in accordance therewith. Notice of appeal was duly and timely served. (11) Application was made for bail in the trial Court pending appeal (115-116) which was granted. (12-13-14) The transcript of the record, including Statement Of Points Relied On, has been filed. (159-160-161)

FACTS.

Appellant registered in the time and in the manner required by law with Local Board No. 40 of San Francisco (Government's Exh. 1), on September 17, 1948. He filed his Classification Questionnaire on September 1, 1949. (Government's Exh. 2) As indicated in the questionnaire, appellant was attending City College of San Francisco, engaged in a premedical course. On August 14, 1950, appellant directed a letter to the local board, advising that in November of 1949 he began his study of the Bible with one of Jehovah's Witnesses and has since that time continually devoted his time to the study of the Bible. That he was enrolled in the Theocratic Ministry School where he learned how to give public lectures and conduct Bible studies. He further states that he is engaged in conducting Bible studies and was devoting all of his time to the vocation of ministry, and in view of the facts set forth in the letter, requested a classification of IV-E (now changed to I-O under the regulations). (Government's Exh. 3) Attached to this letter was a letter from Edwin Soderlund, Company Servant, certifying that the appellant was a duly ordained minister according to the standards of the Watchtower Bible and Tract Society, a recognized religious organization. (Government's Exh. 4) No response was had to the letter from the appellant to the board and it then appears on the Minutes of Actions of Local Board and Appeal Board, attached to the questionnaire, marked Government Exh. 2, that on October 19, 1950 appellant was classified I-A by

a vote of three to nothing. On November 3, 1950, Form 110 was mailed to registrant notifying him of his classification as I-A. On November 9, 1950, appellant directed a letter to Local Board 40, requesting a personal hearing on the grounds that he was an ordained minister and entitled to a classification of IV-D. (Government's Exh. 5) Personal hearing was had on November 30, 1950 and a summary made. (Government's Exh. 6) Thereafter, on December 30, 1950, Form 110 was mailed notifying appellant of the continuation of Class I-A, and appellant was ordered to report for physical. Thereafter, on January 22, 1951 a letter was directed to the local board protesting the classification of I-A given to appellant and directing the board's attention to the reasons as set forth therein why a classification of IV-D as a minister should be given, and setting forth that the appellant regularly and customarily performs the duties of a minister. (Government's Exh. 7) Thereafter, on April 4, 1951 a letter was directed to the local board requesting a reconsideration of appellant's classification, on the ground that appellant was a minister devoting his full time to his calling and stating that his primary vocation is as a minister. Attached to the letter were a number of verified statements and documents attesting to the fact that the appellant is a duly ordained minister, setting forth the work that he does, setting forth the fact that he is considered as a regular and acting minister by the congregation and was performing duties as such, and including a certification from the Watchtower Bible and Tract

Society verifying the fact that he was a duly ordained minister, and also including a statement signed by sixty-two members of the congregation attesting to the fact that they had been present when he had acted as such minister. This letter, together with the accompanying verified statements and documents, appears as one exhibit (Government's Exh. 8). On March 29, 1951 the appellant directed a letter to the State Director of Selective Service and an identical letter to the National Director of Selective Service, pointing out that the local board had given him a classification of I-A but that in truth and in fact he was an ordained minister acting as such, and should be classified IV-D; that he had filed extensive documents signed and verified by representatives of the Watchtower Bible and Tract Society and other members of his religious group and he requested that steps be taken to correct this classification. (Government's Exh. 9) Government's Exhibit 10 is a card issued by the Watchtower Bible and Tract Society attesting to the fact that the appellant was a duly ordained minister of Jehovah's Witnesses. Thereafter, on July 2, 1951 appellant filed a conscientious objector form (Government's Exh. 11), claiming exemption from both combatant and noncombatant training and service by virtue of his religious training and beliefs. In this form it is alleged that the appellant's belief is that there is a Supreme Being above all the earth, and that he has revealed knowledge about himself through the Bible. This belief involves duties that are set down in the Bible, which duties to God supersede any

duties to man. Acts 5:29. This form indicates that appellant's study of the Bible has continued since 1949; that the appellant is a public speaker on Bible subjects and on Tuesdays he preaches door to door; on Wednesdays and Thursday, he conducts Bible studies in people's homes; on Fridays he attends a ministry school and service meetings where he is an instructor speaker. On Sundays he attends Bible lectures and Bible studies. He alleges he made a public consecration and was immersed at a circuit assembly of Jehovah's Witnesses in 1950. He was consecrated on September 3, 1950 at the Scottish Rite auditorium and he was immersed September 3, 1950 at Crystal Plunge. Attached to the form is a statement that the appellant's mother became one of Jehovah's Witnesses in 1946 and from that time on appellant and his mother had many discussions about the Bible, and it was largely due to her efforts that he began his studies.

On July 25, 1951 the District Coordinator of the Selective Service System advised Local Board 40 that the appellant had been registered in the wrong local board, namely, Board No. 40, and should have been registered in Board No. 38, and Board No. 40 was requested to transfer his file to Local Board No. 38, and that Local Board No. 38 continue the processing of the registrant as though he were a late registrant. (Government's Exh. 12) On July 28, 1951, Local Board No. 40 advised the appellant that upon reviewing his record, the correct draft board was 38 rather

than 40 and his file was therefore being forwarded to Board No. 38.

There then appears on the Minutes of Actions by Local Board, attached to Government's Exhibit 2, a note that appellant was classified I-A on September 11, 1951 and that on September 12, 1951 form 110 giving notice of classification was mailed to the appellant. On September 19, 1951, appellant requested a personal appearance before Local Board 38 for the purpose of showing that he was an ordained minister, who is conscientiously opposed to all forms of combatant or noncombatant service in the armed forces. He requested permission to bring an attorney and several witnesses who would testify as to the truthfulness of the foregoing (Government's Exh. 15). On September 24, 1951 local board 38 advised the appellant that under the provisions of the Act he could not bring an attorney or witnesses to testify on his behalf, and could appear on October 1, 1951 but must be unaccompanied (Government's Exh. 16). His personal appearance was then set over to October 8, 1951. Thereafter, on the Minutes of Actions there appears the notation "10/8/51 classified I-A continued—after personal appearance before board—request as an ordained minister and request as a conscientious objector denied". At the time of the personal appearance two affidavits were filed, one by the presiding minister of Jehovah's Witnesses, San Francisco Mission Unit, attesting to the fact that David Schuman, appellant here, is an associated and active minister in

the Mission District Congregation of Jehovah's Witnesses and is enrolled in the Theocratic Ministry School at the local headquarters and that appellant has been found qualified to serve as a presiding minister in one of the regular conducted Bible study groups within the local congregation's territory. A second affidavit by an instructor of the Theocratic Ministry school of the Mission Unit of Jehovah's Witnesses, attests to the fact that appellant is recognized by his school record to be a minister capable of preparing and delivering public Bible lectures, which has been proven by receiving and carrying out given assignments or lectures. (Government's Exh. 17.)

An alleged stenographic transcript of the personal appearance before members of the local board 38 was made after the October 8, 1951 appearance. (Government's Exh. 18.) It appears that the appellant brought a Court reporter with him to take notes on the hearing but the members of the board declined to permit this to be done. The transcript indicates that appellant requested classification as a minister, stating that he was ordained by the Watchtower Society; that his training had been at the Mission Unit of the Theocratic Ministry School of Jehovah's Witnesses. Appellant stated that he did no secular work and that he had given up his pre-med studies because they interfered with his religious work; that he dedicated his life to serve God on September 3, 1950; that appellant is qualified to perform marriages and

speak at funerals and he is now devoting his life to his vocation of preaching. The statement is made in the transcript on page 7 thereof by one of the board as follows: "Your veracity of your faith is unquestionable". The personal appearance also covered the question of conscientious objection raised, and it was stated by the appellant that he was requesting the classification on both grounds of being a minister and as a conscientious objector to all forms of service. There then follows as a summary that "primary vocation is student. Continued in I-A. Request denied for classification as ordained minister and conscientious objector."

On October 17, 1951, a notice of appeal of classification I-A was given to local board 38. In this notice there is also contained a statement that appellant was preparing a letter to the board of appeals that would show the inaccuracies in the summary of his personal appearance. (Government's Exh. 19.) On October 23, 1951 the inaccuracies appearing in the summary were set forth by the appellant. (Government's Exh. 20.) On April 15, 1952 there was a hearing before the Department of Justice and a report made by the hearing officer. (Government's Exh. 27.) In the statement of facts appearing in the hearing officer's report, it is indicated that the mother of the appellant was a Jehovah's Witness for ten years and his father was Jewish; that the registrant devotes considerable time to his religious practices and he wants to spend his life in the propagation of the faith of Jehovah's

Witnesses; that he first started to study the Bible under the supervision of the Jehovah's Witnesses in 1949. In conclusion, the hearing officer stated as follows:

> "The Hearing Officer wishes to emphasize that the registrant became actively identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty."

It was then accordingly recommended that his appeal be not sustained and that he be classified I-A.

On July 24, 1952, the Department of Justice directed a letter to the chairman of the Appeal Board advising them that after examination and review of the file, the Department of Justice found "that the conscientious objections of the above named registrant are not sustained on the ground that he has failed to establish that such alleged objections are based upon deep-seated conscientious convictions arising out of religious training and belief." It was therefore recommended that the Appeal Board refuse to reclassify the appellant. (Government's Exh. 28.)

At the trial a draft board member before whom the personal hearing was had, testified as follows:

> "Q. Now, will you tell us what the basis of your vote was finding that the registrant was not a conscientious objector?
>
> Mr. Karesh. To which we object as incompetent, irrelevant and immaterial. Furthermore,

we say that the action of the Appeal Board superseded the action of the local board and the decisions are in this Circuit as to the latter proposition cannot be disputed, and I have the language from the decision. No matter what the basis of the decision was—let us do it in reverse. One, no matter what the basis of the decision was, it is immaterial, you can't explore his mind and go to his reason. Two, the action of the Appeal Board superseded the action of the local board.

The Court. Objection overruled. Let him answer.

Mr. Brill. I think the Court has ordered you to answer the question.

The Witness. Well, the Board, in deciding his case, felt that he was not a student minister, that he was not a regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector." Transcript of record pages 130-131.

"The Witness. Well, the Board, in considering his case, felt that he was not a full time minister as a vocation. He was probably, as an avocation, acting as a minister.

Q. (By Mr. Brill.) You say he was acting as a minister as an avocation?

A. Well, part time, or maybe some duties, some lectures, something like that, but not a full-time minister as a vocation.

Q. Now, because of the fact that he was not spending his full time as a minister I assume that is what you are telling us?

A. That's right.

Q. Now, what was the basis upon which they found that he was not a conscientious objector?

Mr. Karesh. Your Honor, we renew our objection. The file speaks for itself. We can't go into the mental processes of this person here, said he had no prejudice against the registrant——

Mr. Brill. Just a moment, he hasn't said any such thing. That question wasn't asked.

Mr. Karesh. I thought it was asked.

The Court. According to the testimony, it was part of his testimony, that is all. Overruled. Let him answer. What was the question?

Q. (By Mr. Brill.) The basis upon which you found that he was not a conscientious objector?

A. Well, feeling that he was not a full-time minister——

The Court. You can be a conscientious objector without being a minister.

The Witness. Yes.

Mr. Brill. Your Honor, I am going to object to the Court's advising the witness. I think the witness should be allowed to answer the question.

The Court. All right. I think you are correct. Go ahead and answer the question.

The Witness. The Board felt that not being a full-time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection."

(Trans. pages 142-144.)

At the trial demand was made for the production of the F.B.I. report upon which the Hearing Officer relied but the trial Court refused to order it produced. (Trans. page 70.)

QUESTIONS INVOLVED AND HOW RAISED.

1. Was the classification of I-A instead of IV-D made by the local board after the personal appearance before it, supported by any basis in fact?

2. Was the classification of I-A instead of I-O (conscientious objector) made by the local board after the personal hearing, without basis in fact?

3. Is the recommendation of the Hearing Officer, appointed by the Department of Justice, against appellant's claim for conscientious objector classification, without basis in fact, arbitrary and capricious and in excess of the jurisdiction of such Hearing Officer under the Regulations?

4. Is the recommendation of the Department of Justice against, and the action of the Appeal Board, denying appellant's claim for conscientious objector classification without basis in fact, arbitrary and capricious, and made by virtue of an erroneous interpretation of the Universal Training and Service Act with reference to conscientious objections?

5. Was the refusal of the trial Court in requiring the Government to produce at the trial the secret F.B.I. report used by the Hearing Officer appointed by the Department of Justice, a denial of due process?

SPECIFICATION OF ERRORS.

The trial court erred in:

(1) Denying appellant's motion for judgment of acquittal.

(2) Failing to hold that the classification by the local board of I-A instead of either IV-D or I-O was without basis in fact and arbitrary and capricious.

(3) Failing to hold that the Hearing Officer designated by the Department of Justice denied the claim of appellant for classification as a conscientious objector on artificial and illegal standards and beyond the jurisdiction set forth in the Regulations.

(4) Failing to hold that the Department of Justices recommendation denying appellant a conscientious objector status and the subsequent action by the Appeal Board in reliance thereon, were without basis in fact, arbitrary and capricious, and based upon an artificial and illegal standard.

(5) Failing to require the Department of Justice to produce the secret F.B.I. report which was used by the Hearing Officer in making his recommendation against defendant, thereby denying to defendant his right to be confronted by and cross-examine witnesses against him.

SUMMARY OF ARGUMENT.

Point One.

The local draft board had no basis in fact for the denial of the claim made by appellant for exemption as a minister of religion, and arbitrarily and capriciously classified him in I-A.

Section 16 (g) (1) of the Selective Service Act of 1948 defines the term "ordained minister". Section 16 (g) (2) defines the term "regular minister". These provisions of the act state that a person who pursues the ministry as his customary vocation is entitled to exemption. Section 16 (g) (3) provides that one who does not regularly, as a vocation, preach the principles of religion, but who irregularly or incidentally preaches, is not a minister.

Cox v. United States, 157 F. 2d 787 (C. A. 9th), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, does not control here. That case held that persons who pursued the ministry incidentally to secular work were not entitled to claim the ministerial exemption. This case is governed by *Hull v. Stalter,* 151 F. 2d 633 (C. A. 7th).

It was the responsibility of the local board and the board of appeal to classify the appellant according to his status at the time of his personal appearance before the local board. On that date he was pursuing the ministry as his vocation and was not preaching part-time or incidentally to a secular vocation. The undisputed evidence and facts brought the appellant within

the definition of a minister of religion. There was no evidence to dispute any of the proofs submitted that he was a minister of religion. The finding that he was not a minister flies in the teeth of the evidence and is unlawful. It is without basis in fact. It was the duty of the trial court to grant the motion for judgment of acquittal and discharge the appellant. *Hull v. Stalter,* 151 F. 2d 633 (C. A. 7th); *Arpaia v. Alexander,* 68 F. Supp. 880 (Conn.).

Point Two.

The local board had no basis in fact for the denial of the claim made by appellant for exemption as a conscientious objector opposed to both combatant and noncombatant training, and arbitrarily and capriciously classified him I-A.

A reading of the transcript of the personal hearing before the local board (Government's Exh. 18) will show that nothing appeared therein from which the local board could find that the appellant was not opposed to all forms of military training and service by reason of his religious beliefs. The Board member who conducted the hearing stated: "Your veracity of your faith is unquestioned." The only other board member present gave as his reason why the appellant was not entitled to a conscientious objector classification, the following, appearing at page 131 of the Transcript of Testimony:

> "Well, the Board, in deciding his case, felt that he was not a student minister, that he was not a

> regular ordained minister, and as such his file revealed he was going to school and on that basis felt not being an ordained minister and not a full-time student of a recognized theological seminary with a full course of instruction, he had no basis on his conscientious objector."

and again on page 144 of the Transcript:

> "The Board felt that not being a full time, acting full minister, full vocation, and considering that he is just giving lectures and his file indicating that he was a student up until a certain period, that there was no basis for his conscientious objection."

Point Three.

The recommendation of the Hearing Officer appointed by the Department of Justice against appellant's claim for conscientious objector was without basis in fact and contrary to his own findings.

The report of the Hearing Officer states that appellant "devotes considerable time to his religious practices and wants to spend his life in the propagation of the faith of Jehovah Witnesses"; that he "became actively identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time" * * * to entitle him to exemption.

The Regulations (Section 1626.25 (c)) limit the inquiry to character and good faith of conscientious ob-

jections and since the Hearing Officer found the appellant was sincere, his refusal to recommend such classification was arbitrary and capricious and without basis in fact.

Point Four.

The recommendation of the Department of Justice acted upon by the appeal board, denying appellant a classification as a conscientious objector was based upon artificial and illegal standards and in violation of the Selective Service Act and Regulations.

The recommendation of the Department of Justice (Government's Exh. 28) sets the standard of conscientious objections as "based upon deep-seated conscientious convictions arising out of religious training and belief" while Section 1622.20 of the Regulations provides that the registrant must be found to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces, and Section 6 (j) of Title 1 of the Selective Service Act of 1948 provides in part that religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views, or a merely personal moral code. Nothing appears making it dependent upon duration of such convictions for any set length of time.

Point Five.

The Hearing Officer and the trial Court unlawfully denied the defendant the right to be confronted with the witnesses against him whose names and identities were kept secret in the F.B.I. report furnished to the Hearing Officer and used by him in making his determination.

ARGUMENT.

POINT ONE.

THE LOCAL DRAFT BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR EXEMPTION AS A MINISTER OF RELIGION, AND ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM IN I-A.

Section 16 (g)(1) of the act provides that an ordained minister is one who has been ordained according to the discipline of a religious organization to preach and teach the doctrines of such church. The undisputed evidence shows that the appellant was ordained at the time he made his appearance before the local board in October 1951. In order to claim the benefits of the exemption to an ordained minister the section of the act also provides that the minister must preach as his "regular and customary vocation". Section 16 (g)(3) provides that the term minister does not include one who irregularly or incidentally preaches. The record in this case shows that the appellant pursued the ministry prior to his personal appearance, at the time of his personal appearance and subsequent to his personal appearance as his voca-

tion. There was no evidence whatever before the board or before the court below that he preached irregularly or incidentally to some secular vocation. The undisputed evidence shows that he was engaged in the ministry as a full-time missionary and presiding minister of a congregation of Christian people. It establishes that he preached from the pulpit several times weekly in addition to devoting more than one hundred hours per month to missionary work in the field.

The undisputed facts show that appellant was preaching his religion as an ordained minister of the gospel, which was his vocation rather than his avocation. A vocation is defined by Webster's *New International Dictionary of the English Language,* 2nd Edition, Unabridged, 1950, on page 2854 as follows:

> Vocation (L. *Vocatio* a bidding, a calling, invitation, fr. *vocare* to call; cf. F. vocation. 1. A calling; a summons; a call; specif.: a. *obs.* Convocation, as of an assembly. b. A calling to a particular state, business, or profession. 2. Regular or appropriate employment; calling; occupation; profession; as, to change one's *vocation.* 3. The members of a particular calling or profession, collectively. *Rare.* 4. *Theol.* a. A calling to the service of God in a particular station or state of life, esp. in the priesthood or religious life, as shown by one's fitness, natural inclinations, and, often, by conviction of a Divine invitation. b. The station or state of life to which one receives such a calling. c. An official invitation to a particular ecclesiastical office, as a pastorate.
>
> Syn.—vocation, avocation, hobby. Vocation denotes one's regular calling or profession; an Av-

> ocation is something which calls one away from one's ordinary pursuits; the word commonly suggests a subsidiary or minor occupation, and its employment in the sense of *vocation* is contrary to good usage. * * * A Hobby is a favorite avocation; the word often connotes a mildly indulgent attitude towards what is regarded as extreme. * * * See OCCUPATION.

There is no question but that appellant, a full-time minister, was a regular and duly ordained minister of religion as defined in Section 6(g) and Section 16(g) (1), (2), (3) of the act. He did not irregularly or incidentally teach and preach the doctrines and principles of Jehovah's Witnesses. He regularly, as a vocation, taught and preached the principles of religion and administered the ordinances of public worship as embodied in the creed or principles of the church known as Jehovah's Witnesses. His preaching work was his customary vocation.

The incidental attendance at a Public School prior thereto by appellant does not disqualify him to be classified as a regular or ordained minister of religion. The term "regular minister" used in the regulations has been defined to be one who regularly teaches and preaches. It has been held that the fact that a minister of religion may be performing secular work during the week to support himself and rendering his ministerial services gratuitously did not prevent him from being a regular minister of religion, because he preached regularly each week, and was therefore a regular minister of religion. *Ex parte Cain,* 39 Ala. 440-441.

It is to be observed that the regulations use the word "customarily". Customary, the word from which it is derived, is synonymous with "usual" and "habitual". It does not mean continuously. It is not synonymous with continuously, uninterruptedly, daily, hourly, or momentarily. The *Century Dictionary* defines "customarily" to mean "in a customary manner; commonly; habitually". Therefore the use of the words "regular" and "customarily" implies that Congress intended to give the term "minister of religion" the same broad scope which it has included throughout the history of freedom of worship in this country.

From time immemorial the work of a preacher or minister has not been confined to speaking from a pulpit to a congregation that is capable of supporting the minister financially so as to make it unnecessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, have been forced to work on farms, in grocery stores and at other secular work during six days of the week in order to support themselves and their families, so that they might regularly and customarily preach on Sunday. It is a part of the custom of this country that preaching is done regularly when done on Sunday. As long as a minister preaches regularly on Sunday and at night times during the week he is regularly and customarily preaching. If he regularly and customarily preaches during the week he is a regular minister of religion under the act and regulations. The source of his income is wholly immaterial. Whether his congregation is able

to provide him with an income sufficient to maintain him is immaterial. Whether he is fortunate in being rich and able to maintain himself from stocks, bonds, securities and property investments is not material. Whether the regular minister, like most ministers, is not financially independent, but has to depend on his labors for his support, is also immaterial. Time spent in attending to investments from which an income is derived, or to labor in secular callings, is also immaterial in determining whether or not the minister regularly and customarily preaches.

Throughout history of religious organizations ministers have been distinguished from church-sustained clergy. The self-supporting ministers contributed much more than the orthodox clergy to the spread of religion along with the pioneers in the days of expansion to the West.

> "Although made the special work of certain representative disciples, it is, in fact, enjoined upon the Church as a whole, and upon its members in particular, 'as of the ability which God giveth' (1 Pet. 4:10-11) * * * From these scriptural examples, it is just to infer that lay preaching, in the various forms of teaching, evangelizing, and prophesying, had from the first a double object: 1, to do good to all men; and, 2, to develop and prove the gifts of those who from time to time were called from the ranks of the laity to the more public ministry of the Word. Such, doubtless, continued to be the practice of the Church during the early centuries, and it was only by degrees that it became modified under the hierarchial

spirit which became developed at a later period * * * In the Reformed churches there was a general breaking away from the trammels of ecclesiasticism, together with an energy of purpose which did not scruple to employ any agencies at its command for the dissemination of truth. * * * The first formal and greatly effective organization of lay preaching as a system, and as a recognized branch of Church effort, took place under John Wesley at an early period of that great religious movement known as the revival of the 18th century." *Cyclopedia of Biblical, Theological, and Ecclesiastical Literature,* McClintock and Strong, New York, Harper & Bros., 1880.

The English Court of Appeal held that the conscription law of that country, passed during the first world war, should be given an interpretation so as to include a part-time minister of unorthodox Strict Baptist Church. (*Offord v. Hiscock,* 86 L.J.K.B. 941.) In that case the person held to be a minister was a solicitor's clerk during six days of the week. He was invited to preach on one occasion and it appeared that he was satisfactory, so he was engaged as the minister. In that case Viscount Reading said: "I have come to the conclusion that there is an absence of any evidence from which the Justices could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view it is clear that he had determined to devote himself to the ministry."

Under the Canadian National Selective Service Mobilization Regulations the Supreme Court of Sas-

katchewan held that a registrant was entitled to exemption from all training and service as a minister of religion. (*Bien v. Cooke,* 1944, 1 W.W.R. 237.) There the minister spent, in farming, six days of each week. All that was required was that he satisfy the general secretary, who was a railroad engineer, that he believed the New Testament, and that he meet the necessary moral requirements.

The United States Court of Appeals for the Second Circuit, in *Trainin v. Cain,* 144 F. 2d 944, said that the regular performance of secular employment was not incompatible with the claim for exemption as a regular minister of religion: "While the two positions are not mutually exclusive, and a validly draft-exempt minister of religion could still maintain a legal practice on the side, the existence of the latter can be taken into consideration in determining whether registrant is in fact a regularly practicing minister."

The mere fact that a poor preacher of a financially weak congregation is required to perform secular work during the week to support himself in the ministry does not bar him from claiming the exemption as a minister of religion as long as he regularly and customarily teaches and preaches the doctrines and principles of a recognized religious organization. In determining whether or not there is basis in fact for a draft board determination denying a claim for exemption or deferment under the act such action cannot be supported solely by a finding that such person had other activities on the side that would not, within

themselves, entitle such person to exemption or deferment. If the facts establish that such person comes within the exemption or deferment granted under the act, incidental activities not entitling him to exemption or deferment are wholly irrelevant and immaterial.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work, although he may regularly and customarily teach and preach the doctrines and principles of his church as a minister. "Upon this point a page of history is worth a volume of logic."—Mr. Justice Holmes, *N. Y. Trust Company v. Eisner,* 256 U.S. 345, 349.

The liberal construction placed upon the act so as not to confine exemption solely to the orthodox clergy is demonstrated by the fact that officers of the Salvation Army, Lay Brothers of the Catholic Church, the practitioners, readers and lecturers of Christian Science in the Church of Christ Scientist, cantors in the Jewish congregation, counselors of the Mormon Church, and colporteurs of the Seventh-day Adventist Church were all declared by General Hershey to be exempt under the Selective Training and Service Act of 1940.

A narrow, restrictive and orthodox determination would also exclude entirely those persons above mentioned who were included within the exemption by the

Director. A construction of the act so as to exclude Jehovah's Witnesses discriminates against them without cause, justice or reason.

Since neither the act nor the regulations exclude dissentient groups, they cannot be construed to exclude unorthodox ministers. It must be assumed that the act and regulations were intended to embrace within the exemption the ministers of all denominations, whether popular or unpopular, orthodox or unorthodox. Any other view would require us to impute to Congress the intention of discriminating between religious denominations and ministers according to nebulous or arbitrary standards, with resultant inequitable, crotchety application of the statute.

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another. * * * Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton v. Howe,* 31 Beavin 14.) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson v. Jones,* 80 U. S. (13 Wall.) 679, 728, thus:

> "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

The method of teaching and preaching employed by appellant and Jehovah's Witnesses is primitive. That is to say, they use the original method of preaching instituted by Jehovah's Great Witness, Christ Jesus. He and his apostles preached publicly and from house to house. (Acts 20:20.) Every true Christian minister of the gospel is commanded to follow in their footsteps and must do likewise. (1 Peter 2:21; Luke 24:48; Acts 1:8; 10:39-42.) Since Jehovah's Witnesses take the message to the people their preaching is distinguishable from that of the religious clergy, who require people to come to them and sit at their feet to be preached to.

Jehovah's Witnesses do not confine their preaching to church buildings. Experience and statistics prove that not all people can be reached in that manner because they will not all come to such buildings.

More than 70,000,000 people in the United States do not belong to any religious organization. Many other millions do not attend any church, although they nominally belong to one of the religious organizations. These nonchurchgoers are not heathen. The preaching activity of Jehovah's Witnesses reaches not only these millions of persons who depend almost entirely upon Jehovah's Witnesses to bring them spiritual food, but

in addition their preaching activity from door to door reaches millions of people who belong to religious organizations who "sigh and cry because of the abominations" committed therein (Ezekiel 9:4; Isaiah 61:1-3.) Jehovah's Witnesses have answered the need of these people by bringing them printed sermons at their homes, which meets their convenience. It is just as important to have primitive ministers and evangelists going from door to door to maintain the morale of these millions as it is to preserve the morale of those who attend some orthodox religious organization's church services. How would these persons who do not attend any church be comforted in their sorrow and obtain some spiritual sustenance unless some missionary evangelist brought it to them at their homes? Few, if any, of the orthodox religious clergy call upon the people from door to door. They have their established congregations. They expect the people to come to their church edifices to receive what instruction they have to offer. Accordingly, these millions of persons would starve for want of spiritual food were it not for Jehovah's Witnesses who bring Bible instruction to them in their homes. Thus Jehovah's Witnesses locate the people of good-will toward Almighty God. If they desire further aid in the study of the Bible Jehovah's Witnesses establish Bible studies in their homes. In this way Jehovah's Witnesses educate the people in the way of life and point them to the avenue of escape from the greatest crisis yet known.

Jehovah's Witnesses are an international group of missionary evangelists who get their name from Al-

mighty God, whose name alone is Jehovah. (Psalms 83:18; Isaiah 43:10-12.) Their preaching duties are to call from door to door, preaching and presenting Bibles and Bible literature explaining about God's kingdom described in the Bible as the only hope of the world. The whole earth is divided into countries or branches, each branch is divided into districts, each district is divided into circuits, each circuit is divided into areas, each area is assigned to one or more missionary evangelists of Jehovah's Witnesses. The ones assigned to each area have a duty to preach from door to door in that area. Persons interested are called back on, for the purpose of establishing regular home Bible studies, which are conducted for a year or more. This is done in order that all such persons may get a complete understanding of the things that the Bible clearly teaches concerning God's kingdom and their relationship to Jehovah and His kingdom by Christ Jesus.

In addition to this method of preaching Jehovah's Witnesses also preach on the street corners by distributing Bible literature. They also deliver public lectures and sermons in various buildings engaged by them for that purpose. Primarily the congregations of Jehovah's Witnesses are in the homes of the people. Their pulpits may well be said to be at the doorstep of the home of every person of good-will throughout the nation.

It is not necessary to know theology, philosophy, art, science and ancient classic languages to preach

the gospel. One is not required to wear a distinctive garb, live in a parsonage, ride in an expensive automobile, have a costly edifice in which to preach, and command a high salary, to qualify as a minister of God. Jehovah's Witnesses emulate their Leader, Christ Jesus, and His apostles, rather than the ancient or modern scribes and Pharisees. Instead of a program of choir and organ music followed by discourse on science and philosophy of men, Jehovah's Witnesses devote all their time to studying and teaching the Bible and carrying God's message to the people at their homes. They are ministers in the real and true sense and serve all the people. Paul, the apostle, said that the true minister teaches publicly and from house to house. (Acts 20:20; Luke 22:24-27.) It is written that Christ Jesus "went around about the villages, teaching" and "preaching the gospel of the kingdom". (Mark 6:6; Matthew 9:35; Luke 8:1.) The apostle Peter advises each minister of Jehovah God: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2:21.) Jesus expressly commanded His twelve ordained ministers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10:7, 10-14.) In the four Gospel accounts of the ministry of Jesus, the words "house" and "home" appear more than 130 times, and in the majority of those times it is in connection with the preaching activity of Jesus, the great Exemplar. His example of carrying the gospel message to the people at their homes and in the public

ways was "true worship". He said: "But the hour cometh, and now is, when the true worshippers shall worship the Father in spirit and in truth: for the Father seeketh such to worship him. God is a Spirit: and they that worship him must worship him in spirit and in truth." (John 4:23, 24.) His apostle James further describes such worship by ministers of Almighty God at James 1:27, "For the worship that is pure and holy before God the Father is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world." (*Syriac New Testament, Murdock's Translation.*)

Books and booklets are used by appellant and Jehovah's Witnesses in their preaching work for the convenience of the people. Such publications contain the truths of the Bible in a permanent form for study by the interested person at his convenience. Today such persons cannot afford to have the minister stay with them hours and days at a time, as was customary centuries ago or in less recent years. Literature used by Jehovah's Witnesses is a substitute for the oral sermon or Bible discourse that is available to only the few. The literature is not printed and distributed selfishly for commercial gain or to achieve a large volume of profits. Indeed the literature is offered on a contribution basis. Persons unable to donate toward the work but who are interested may have the literature free or upon such terms as they desire to receive it. (1 Corinthians 9:11-14.) Contributions received when the literature is distributed are used to help defray cost of publishing and distributing more like litera-

ture. Any deficit is taken care of by Jehovah's Witnesses.

The method of preaching employed by Jehovah's Witnesses is by making house-to-house calls, and regularly delivering public sermons, preaching in the schools and congregations of Jehovah's Witnesses, conducting home Bible studies, preaching on the streets and distributing literature containing explanation of Bible prophecies. It has been argued that Jehovah's Witnesses are mere distributors of books. It is asserted that they are colporteurs and no more. It is said then that by reason of this status they are not entitled to claim the benefit of the exemption contained in the act. It boils down to the argument that Jehovah's Witnesses, although a religious organization, are not entitled to have their ministers protected by law, even though the protection is extended to the ministers of all other denominations. This is grossly inconsistent with the former Selective Service policy with reference to other religious organizations which are engaged solely in the business of distributing books. For instance, the colporteurs of the Seventh-Day Adventist organization are not ministers in the sacerdotal sense.

Seventh-Day Adventist colporteurs are mere "Gospel workers" whose qualifications are claimed to be equal in standing with those who preach the gospel. (White, *The Colporteur Evangelis,* Mountain View, Calif., 1930.) They are not ordained as are Jehovah's Witnesses. They merely sell books. They do not conduct home Bible studies. They do not make revisits;

they do not preach before congregations; they do not conduct baptismal ceremonies; they do not participate in the burial of the dead; they do not perform other ceremonies, all of which are performed by Jehovah's Witnesses, as will be hereinafter shown. Nevertheless the liberal policy of the Government was extended so as to permit these colporteurs of the Seventh-Day Adventist organization to be classified as ministers of religion exempt from all training and service.

In allowing the colporteurs to be classified as ministers no stringent requirement was invoked for the consideration of their classification as is invoked in the consideration of the claim for exemption by Jehovah's Witnesses. Compare the requirements: State Director Advice 213-B issued by General Hershey, in determining the ministerial status of these Seventh-Day Adventist colporteurs, among other things, says that "even though they are not ordained" they are entitled to be classified as ministers of religion when any such colporteur is "found to be actually engaged in a *bona fide* manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials".

Jehovah's Witnesses are more than colporteurs. They preach and teach, in addition to merely distributing literature.

The term "regular minister of religion" as used in the Selective Training and Service Act of 1940 was given a very broad definition by the National Director of the Selective Service System insofar as it

applied to most religious organizations and their ministers. "The principle was extended to persons who were not, in any strict sense, ministers or priests in any sacerdotal sense. It included Christian Brothers, who are religious, who live in communities apart from the world and devote themselves exclusively to religious teaching; Lutheran lay teachers, who also dedicate themselves to teaching, including religion; to the Jehovah's Witnesses, who sell their religious books, and thus extend the Word. It includes lay brothers in Catholic religious orders, and many other groups who dedicate their lives to the spread of their religion." *Selective Service in Wartime,* Second Report of the Director of Selective Service 1941-42, Government Printing Office, 1943, p. 241.

The Director of Selective Service did not confine the preaching and teaching to oral sermons from the pulpit or platform. He said that such is not the test. "Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or effect its purpose or goal. One may shout his message 'from housetops' or write it 'upon tablets of stone.' He may give his 'sermon on the mount,' heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the Cross. He may carry his message with the gentleness of a Father Damien to the bedside of the leper, or hurl inkwells at the devil with all the crusading vigor of a Luther. But if in saying the word or doing the thing which gives expression to the principle of religion, he conveys to

those who 'have ears to hear' and 'eyes to see', the concept of those principles, he both preaches and teaches. He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.

"But to be a 'regular minister' of religion he must have dedicated himself to his task to the extent that his time and energies are devoted to it to the substantial exclusion of other activities and interests." *Selective Service in Wartime,* pp. 240-241.

Appellant is ordained; therefore he is an ordained minister of religion within the meaning of the act and regulations. The Director of Selective Service declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme." *Selective Service in Wartime,* Second Report of the Director of Selective Service 1941-42, p. 240.

It has been held that the term "ordained minister", as used in the statute licensing ministers to solemnize

marriage ceremonies, "has no regard to any particular form of administering the rite or any special form of ceremony. * * * It has been the practice of this Court therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the Court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies." *In re Reinhart,* 9 Ohio Dec. 441, 445.

This same broad and liberal interpretation of the term "ordained minister" as it relates to exemption of a minister of a religious denomination under the National Selective Service Mobilization Regulations of Canada has been considered by Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien v. Cooke,* 1944, 1 W.W.R. 237. In that case he said: "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the

congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

The ministry is not confined to adult persons or to the aged. Youths not only are permitted to preach, but are invited to do so. (Joel 2:28, 29; Psalms 148:12, 13) Children of Jehovah's Witnesses are reared in the nurture and admonition of the Lord, being trained for the ministry at a very early age. After being thoroughly schooled, they may enter the ministry, if they so desire, although yet children or youths. Ancient outstanding examples are Samuel, Jeremiah and Timothy, whose faithfulness as Jehovah's Witnesses in very early youth is proof of the propriety of children's acting as ministers. (1 Samuel 1:24; 2:11; 3:1; Jeremiah 1:4-7) Paul the apostle declares that he sent Timothy forth as a minister. (1 Corinthians 4:17) Timothy was instructed by Paul to let none despise his youthfulness.—1 Timothy 4:12.

The youthfulness of appellant does not affect his qualifications for the ministry. If he is old enough to be taken into the armed forces and assume such responsibilities he is old enough to be a minister. Preaching at an early age is not unusual to followers of Christ. His parents reared him "in the nurture and admonition of the Lord" and put him into the "temple service" or preaching at an early age, as required by Jehovah and as commanded in His statutes recorded at Deuteronomy 6:4-7. See Ephesians 6:1-4: "Children, obey your parents in the Lord: for this is right. Honour thy father and mother;

which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth. And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord." See also Ecclesiastes 12:1; Psalms 71:17; Genesis 18:19.

Christ Jesus, when but twelve years of age, was already about his "Father's business", discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, He said: "Suffer little children to come unto Me, and forbid them not: for of such is the kingdom of God." (Luke 18:16; see also Matthew 18:1-6) Psalms 8:2: "Out of the mouths of babes and sucklings hast Thou ordained strength"; Psalms 148: 12, 13: "Both young men, and maidens; old men, and children: let them praise the name of the Lord: for His name alone is excellent; His glory is above the earth and heaven."—Proverbs 8:32.

Regardless of the age at which appellant began his ministry, there is nothing to show that he was disqualified to act as a minister of Almighty God at the time of his classification, and, as a minister, he is entitled to complete exemption.

Cox v. United States, 157 F. 2d 787 (C. A. 9th), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, and *Martin v. United States,* 190 F. 2d 775 (C.A. 4th), do not apply here. The reason is that in each of those cases the appellant devoted a large and substantial part of his time to performance of secular work at the time of final classification. In this case

the evidence shows that the appellant did not perform any secular work. The evidence showed without dispute that he pursued the ministerial work as his vocation and that he did not perform the ministry incidentally as did the appellants in the *Cox* and *Martin* cases, *supra*. The facts in this case are brought squarely within the rule announced by the Court in *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th). In that case the registrant was a full-time pioneer minister for the Watchtower Bible and Tract Society, which is the same as the appellant in this case. The rule applied in the *Hull* case ought to apply here.

The undisputed record that the various draft boards had before them before the induction date showed that the appellant was a duly ordained minister, having been ordained "in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization." (Section 16(g)(1) of the Selective Service Act of 1948.)

The language of the Court of Appeals for the Seventh Circuit in *Hull v. Stalter,* 151 F. 2d 633, is

appropriate. In that case, involving an arbitrary classification of one of Jehovah's Witnesses on facts similar to the facts in this case, the Court said: "The fact is, they have been recognized as a religious organization and are entitled to the same treatment as the members of any other religious organization. * * * In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification."

The same liberal interpretation that was placed upon the act and regulations and as construed and applied by the Court of Appeals for the Seventh Circuit should be adopted by this Court and applied to the facts in this case so as to reach the same conclusion as was reached by that court in *Hull v. Stalter,* 151 F. 2d 633. That Court said:

> "* * * In our view, every registrant, whether he be Jehovah's Witness or otherwise, is entitled to have his status determined according to the facts of his individual case. Also, a registrant's classification should be determined by the realities of the situation, not merely by what he professes. A registrant is not entitled to exemption merely because he professes to be a minister, but he is entitled to such exemption if his work brings him within that classification.

"Selective Service Regulations (622.44) recognize two classes of ministers, (1) a regular minister of religion, and (2) a duly ordained minister of religion. The former 'is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member * * *.' The latter 'is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church * * *.' The Selective Service System has even more broadly defined the term 'regular minister of religion.' Under the heading, 'Special Problems of Classification' (Selective Service in Wartime, Second Report of the Director of Selective Service, 1941-42, pages 239-241), it is stated: 'The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or affect its purpose or its goal. One may preach or teach from the pulpit, from the curbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone". He may give his "sermon on the mount", heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross. * * * He may walk the streets in daily converse with those about him telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such

> method has been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion. * * * To be a "regular minister" of religion the translation of religious principles into the lives of his fellows must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant.' "

The determination by the draft boards that the appellant was not a minister within the meaning of the act and regulations was arbitrary and capricious. The determination ought to be upset by this Court on the authority of *Niznik v. United States*, 184 F. 2d 972 (C.A. 6th) (opinion on the second appeal). In that case the Court said:

> "Although the members of the draft board performed long, laborious, and patriotic duties, nevertheless, their ruling in this regard, that appellants were not entitled to classification as ministers of religion, was based not upon the evidence or information in appellants' files, or upon a belief in the truthfulness of the statements made by appellants, but upon the fact that they were members of Jehovah's witnesses. * * *
>
> Disregard of this provision, and refusal to classify as a minister of religion solely on the ground that appellants were members of a religious sect and that they had not attended a religious seminary and had been regularly ordained, was arbitrary and contrary to the law and regulations. 'In classifying a registrant there shall be no discrimination for or against him because

of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.' Section 623.1 (c) of the Selective Service Regulations."

It was the responsibility of the local board to classify the appellant on October 8, 1951 according to the facts as they existed when he appeared before the local board on that date. In *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th), the Court held that each registrant was entitled to be classified as of the time of the final classification rather than as of the time of registration or the filing of the questionnaire. The Court said:

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by §5 (h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed judge of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be per-

> mitted to show his changed status any time prior to his induction into service and therefore be entitled to deferment. And we see no reason why a registrant claiming to be exempt as a minister should not be classified according to his status at the time of his final classification rather than that at the time of registration."

The evidence submitted to the board by the appellant in this case was not discredited or impeached by the local board or the Government in the Court below. The documentary evidence was accepted as true by the local board and the only bases for the denial of the IV-D classification were the arbitrary and capricious grounds stated by the board upon appellant's personal appearance. In the *Cox* case there was an issue of fact before the local board. In the case at bar there is no issue of fact and the fact situation is drawn clearly within that involved in *Niznik v. United States*, 184 F. 2d 972 (C.A. 6th). There is, moreover, no basis in fact for the determination and the rule stated in *Estep v. United States,* 327 U.S. 114, about no basis in fact applies. The attention of the Court is drawn to the opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in *Cox v. United States,* 332 U.S. 442, where it was said:

> "It is not disputed that Jehovah's Witnesses constitute a religious sect or organization. We have, moreover, recognized that its door-to-door evangelism is as much religious activity as 'worship in the churches and preaching from the pulpits.' *Murdock v. Pennsylvania,* 319 U.S. 105. The Selective Service files of these petitioners establish, I think, their status as ministers * * *

"To deny these claimants their statutory exemption is to disregard these facts or to adopt a definition of minister which contracts the classification by Congress.

"* * * It is not uncommon for ordained ministers of more orthodox religions to work a full day in secular occupations, especially in rural communities. They are nonetheless ministers. Their status is determined not by the hours devoted to their parish but by their position as teachers of their faith. It should be no different when a religious organization such as Jehovah's Witnesses has part-time ministers. Financial needs may require that they devote a substantial portion of their time to lay occupations."

The attention of the Court is called also to the opinion of Mr. Justice Murphy in the *Cox* case, where he said:

"It is needless to add that, from my point of view, the proof in these cases falls far short of justifying the conviction of the petitioners. There is no suggestion in the record that they were other than bona fide ministers. And the mere fact that they spent less than full time in ministerial activities affords no reasonable basis for implying a non-ministerial status. Congress must have intended to exempt from statutory duties those ministers who are forced to labor at secular jobs to earn a living as well as those who preach to more opulent congregations. Any other view would ascribe to Congress an intention to discriminate among religious denominations and ministers on the basis of wealth and necessity for secular work, an intention that I am unwilling to impute. Accordingly, in the absence of

more convincing evidence, I cannot agree that the draft board classifications underlying petitioners' convictions are valid."

The decision in *Cox v. United States,* 332 U.S. 442, and the decision in *Goff v. United States,* 135 F. 2d 610 (C.A. 4th), have been made inapplicable by reason of the explicit Congressional definition of a minister in Section 16 of the Selective Service Act of 1948.

It is plain that the vocation and calling of the appellant is his ministry. This was his status on the occasion of his hearing before the local board. He cannot be denied his ministerial classification because theretofore he may not have been a minister or did not become a full-time minister until September 3, 1950. The situation in that respect in this case is the same as that involved in *Hull v. Stalter,* 151 F. 2d 633 (C.A. 7th).

POINT TWO.

THE LOCAL BOARD HAD NO BASIS IN FACT FOR THE DENIAL OF THE CLAIM MADE BY APPELLANT FOR EXEMPTION AS A CONSCIENTIOUS OBJECTOR OPPOSED TO BOTH COMBATANT AND NONCOMBATANT TRAINING, AND ARBITRARILY AND CAPRICIOUSLY CLASSIFIED HIM I-A.

It has been held repeatedly that a determination of the proper classification must be made by reference to the facts appearing in the draft board file.

> "Consequently when a court finds a basis in the file for the board's action that action is conclusive."
>
> *Cox v. U. S.,* 332 U.S. 442.

A review of the file in the instant action fails to disclose any fact which could in any way disqualify the appellant from classification as a conscientious objector, independent of the question of his ministerial status. On the contrary, the file and the record disclose that the local board determined that appellant was not a conscientious objector upon the sole ground that he was not an ordained minister and had not attended a recognized theological seminary with a full course of instruction. (Tr. pp. 131-144.)

Appellant had the right to show the basis upon which the draft board acted in order to show there was no basis in fact.

> "As we understand it, at his trial he may call the members of the board and may himself take the stand; he may testify as to what he told them, and he may cross-examine them as to their motives, and in general as to the basis of their finding."
>
> *U. S. ex rel., Kulick v. Kennedy,* 157 Fed. 2d 811 (C.A. 2nd).

The cases are uniform that the appellant is entitled to due process which includes a fair hearing by the local board within the purview of the Selective Service Act.

This Court held in the recent case of *Knox v. U. S.* (C.A. 9th) Number 13,166, decided December 4, 1952, as follows:

> "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and

acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities.

But, it is suggested, a presumption of regularity or of the due performance of duty attends official action; and it should be presumed in this instance not only that the local board considered the claims of the registrant, but that in light of them it took action to continue in effect his original I-A classification. We think the court may not indulge the presumption, at least in the latter respect, in the condition of the record in the case."

The requirement of due process should certainly prevent the members of the local board from disregarding entirely the Regulations applicable to defining conscientious objectors, and allowing them to arbitrarily and capriciously set illegal and false standards by which the determination is to be made as to who is a conscientious objector.

The Selective Service Act and Regulations set up the standards to be used and the basis for determination.

Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a

> Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."
>
> 32 *C.F.R.* 797.

Appellant's belief and objections against combatant and noncombatant service are based on his "relation to a Supreme Being involving duties superior to those arising from any human relation". The file shows that his belief is not based on "political, sociological, or philosophical views or a merely personal moral code". There is nothing whatever in the file to dispute appellant's claim. The findings of the local board are subject to attack when the board arbitrarily deprives the registrant of a hearing in accordance with the requirements of due process. *Poole v. U. S.,* 159 Fed. 2d 312 (C.A. 4th); *Niznik v. U. S.,* 173 Fed. 2d 328 (C.A. 6th).

POINT THREE.

THE RECOMMENDATION OF THE HEARING OFFICER APPOINTED BY THE DEPARTMENT OF JUSTICE AGAINST APPELLANT'S CLAIM FOR CONSCIENTIOUS OBJECTOR WAS WITHOUT BASIS IN FACT AND CONTRARY TO HIS OWN FINDINGS.

Section 1626.25 of the regulations provides as follows:

> "Section 1626.25. *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled

> to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action: * * *
>
> (c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred in Class IV-E. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained."

The Regulations define the scope of the inquiry to be made by the Hearing Officer for the Department of Justice as being "an inquiry and hearing on the character and good faith of the conscientious objections of the registrant." Such a hearing was had. (Government's Exh. 27.) The hearing was had on April 15, 1952, and by the facts found by the Hearing Officer, it was found that the appellant first started studying the Bible under the supervision of the Jehovah's Witnesses in 1949, however, his mother, with whom appellant lived, had been an ardent Jehovah's Witness for the past ten years. It was

further found that "registrant devotes considerable time to his religious practices and wants to spend his life in the propagation of the faith of the Jehovah Witnesses." Nothing appears that would be derogatory in any manner or inconsistent with the finding in April of 1952 that the appellant was opposed to both combatant and noncombatant military training and service. The conclusion of the Hearing Officer again emphasizes "the registrant became identified with the Jehovah Witnesses in 1949 and although, apparently, sincere in his religious beliefs, he has not been identified with the faith a sufficient length of time to convince the undersigned that he is entitled to exemption from military duty." This in effect is a conclusion reached by the Hearing Officer that appellant was sincere in his religious beliefs and the only ground upon which his claim was denied was the fact that he had only been a Jehovah's Witness approximately three years. To uphold the validity of the findings made by the Hearing Officer would be in effect to add a provision to the Regulations that not only must the appellant be in good faith in his conscientious objections, but he must also have had conscientious objections for a period longer than three years. This, obviously, was not the intention of Congress in enacting the Selective Service Act or Regulations thereunder.

The Circuit Court of Appeals for the Seventh Circuit has held that the registrant must be classified according to his status as it was found at the time of his final classification, rather than at the time of

registration or any other time. (*U. S. ex rel., Floyd Hull v. John Stalter,* 151 Fed. 2d 633.) If, as was the case here, the Hearing Officer found that the appellant was in good faith in making his conscientious objections, he was under a duty to recommend that such objections be sustained. In holding that appellant had not been a member of the Jehovah's Witnesses long enough, and placing his denial of such objections on this ground, was clearly an abuse of discretion and beyond the express jurisdiction given him under the Regulations.

> "Thus it is error reviewable by the courts when it appears that the proceedings conducted by such boards 'have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.'"
> *U. S. ex rel. Trainin v. Cain,* 144 F. 2d 944, 947.

POINT FOUR.

THE RECOMMENDATION OF THE DEPARTMENT OF JUSTICE, ACTED UPON BY THE APPEAL BOARD, DENYING APPELLANT A CLASSIFICATION AS A CONSCIENTIOUS OBJECTOR WAS BASED UPON ARTIFICIAL AND ILLEGAL STANDARDS AND IN VIOLATION OF THE SELECTIVE SERVICE ACT AND REGULATIONS.

The Department of Justice, in its letter to the Appeal Board, denied appellant his right to classification as a conscientious objector on the ground that such objections were not "based upon deep-seated conscientious convictions arising out of religious

training and belief". (Government's Exh. 28), Section 6(j) of Title I of the Selective Service Act of 1948 sets forth the standards by which religious training and belief in connection with such conscientious objections shall be determined, and in this regard, sets forth that it means "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code." Nothing appears making it dependent upon duration for any set length of time. The Department of Justice in this case attempted to read into the Regulations an artificial standard not called for by the Regulations. It is obvious that a person can be as conscientious in his convictions even though they were drawn from religious training which extended over a period of only two or three years, as they could be if the religious training extended for a period of ten years. It is obvious that the only search and inquiry is directed to the person's beliefs and sincerity of such beliefs, without relation to the length of time the believer has held such beliefs.

It must be remembered that the Department of Justice did not question the sincerity or present beliefs of the appellant nor does anything appear in the file or in the Hearing Officer's report which in any way would impugn the sincerity of the appellant.

By the addition of the artificial standards not called for by the Regulations, and in violation of the Regu-

lations the action of the Department of Justice and the Appeal Board was arbitrary and capricious and in violation of the Selective Service Act and Regulations, and in excess of the jurisdiction expressly given the Department of Justice and the Appeal Board and made without basis in fact.

POINT FIVE.

THE HEARING OFFICER AND THE TRIAL COURT UNLAWFULLY DENIED THE DEFENDANT THE RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM WHOSE NAMES AND IDENTITIES WERE KEPT SECRET IN THE F.B.I. REPORT FURNISHED TO THE HEARING OFFICER AND USED BY HIM IN MAKING HIS DETERMINATION.

This point was raised in the trial Court on the motion for acquittal (Trans. pages 108-109), and in the statement of points relied on for appeal. (Trans. page 161.)

Since the trial of the within action, the Supreme Court of the United States decided the cases of *U. S. v. Nugent,* No. 540 and *U. S. v. Packer,* No. 573, and by a five to three decision held in effect that the registrants were not entitled to have the F.B.I. reports introduced in evidence at the trial. The writer has just been informed that the Supreme Court has granted the right to file a petition for rehearing of the *Nugent* and *Packer* cases, and it is for this reason this point is raised here. It is desired to preserve this point pending a possible rehearing and change in the Supreme Court's determination of the question.

CONCLUSION.

The judgment of the Court below is erroneous for the reasons hereinabove set forth. The conviction ought to be reversed and set aside. A judgment discharging appellant ought to be directed to be entered by the trial Court. In the alternative, a new trial ought to be ordered in accordance with the opinion to be written in this case.

Dated, San Francisco, California,
July 3, 1953.

Respectfully submitted,
John H. Brill,
Attorney for Appellant.

No. 13,692

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID DON SCHUMAN, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	}

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

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No. 13,692

IN THE

United States Court of Appeals

For the Ninth Circuit

David Don Schuman,
Appellant,
vs.
United States of America,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant, David Don Schuman, was indicted by the Grand Jury on September 4, 1952 for knowingly refusing to submit himself to induction (Tr. 3-4; see Appendix A). In conformity with Rule 23 of the Rules of Criminal Procedure appellant on September 24, 1952 waived trial by jury and requested that his case be tried before the Court (Tr. 6). On October 17, 1952 appellant was tried in the United States District Court for the Northern District of California, Southern Division, the Honorable Monroe M. Friedman, District Judge, presiding.

On November 7, 1952 the defendant was adjudged guilty of a violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a) (refusal to submit to induction). Appellant was sentenced to a period of 18 months in an institution to be designated by the Attorney General (Tr. 10). On November 12, 1952 appellant filed a notice of appeal herein (Tr. 11-12).

The jurisdiction of this Honorable Court was invoked under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant herein registered for Selective Service on September 17, 1948 (page 1, Selective Service file, Exh. 1, et sequitur).[1] On July 25, 1951 the District Coordinator of the Selective Service System advised Local Board No. 40 that appellant had been registered in the wrong Local Board and should have been registered in Local Board No. 38. Thereafter, his file was forwarded to Local Board No. 38.

Appellant was classified I-A on September 11, 1951 by said Local Board No. 38. On September 21, 1951 the registrant requested a personal appearance. On October 8, 1951 defendant was continued in Class I-A after a personal appearance before the Board in which he requested classification as an ordained minister or as a conscientious objector.

---

[1]The Selective Service file will hereinafter be designated as the "file".

On April 15, 1952 a hearing was held before a Hearing Officer of the Department of Justice pursuant to Section 456 of Title 50, Appendix, U.S.C. (Tr. 135). Thereafter, on August 7, 1952 appellant was continued in Class I-A by a vote of 3 to 0 by the Appeal Board (Panel 3 for the State of California) (page 110, file). On August 12, 1952 appellant was ordered to report for induction (page 133, file). In compliance with this order, on the 28th day of August, 1952, appellant completed all processes of induction except to obey the order to take the final step forward, which he was instructed would constitute his induction into the Armed Forces (Tr. 44). (Those facts which bear upon the basis of the Selective Service System's findings will be designated in the main body of the argument.)

At the trial demand was made for the production of a Federal Bureau of Investigation report which was furnished the Hearing Officer of the Department of Justice (Tr. 70). The Trial Court held that this report was not material to the issues involved in the case (Tr. 70).

QUESTIONS INVOLVED.

The only questions involved are:

1. Was there a basis in fact for appellant's I-A classification?

2. Did the Department of Justice proceed properly in making its recommendation?

3. Did the trial Court properly refuse appellant's request for the F.B.I. reports concerning him?

SPECIFICATION OF ERRORS.

Appellant specifies error as follows:

1. Denying appellant's motion for judgment of acquittal.

2. Failing to hold that the classification by the local board of I-A instead of either IV-D or I-O was without basis in fact and arbitrary and capricious.

3. Failing to hold that the Hearing Officer designated by the Department of Justice denied the claim of appellant for classification as a conscientious objector on artificial and illegal standards and beyond the jurisdiction set forth in the Regulations.

4. Failing to hold that the Department of Justice's recommendation denying appellant a conscientious objector status and the subsequent action by the Appeal Board in reliance thereon, were without basis in fact, arbitrary and capricious, and based upon an artificial and illegal standard.

5. Failing to require the Department of Justice to produce the secret F.B.I. report which was used by the Hearing Officer in making his recommendation against defendant, thereby denying to defendant his right to be confronted by and cross-examine witnesses against him.

SUMMARY OF ARGUMENT.

I.

Courts have no power to weigh the evidence to determine whether a classification made by the draft board is justified. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. In the instant case appellant was a college student at the time of his hearing before the Department of Justice. The evidence demonstrates he neither occupied a position analogous to regularly ordained ministers of older and better known religious denominations or pursued a full time course of instruction in a recognized theological or divinity school. There was basis in fact for denying a IV-D (minister) classification.

II.

The times at which defendant, first, became seriously interested and, second, ordained in the ministry form a suspicious circumstance, since he became seriously interested in Jehovah's Witnesses shortly after registering for the draft and became an ordained minister shortly after the outbreak of the Korean war. The burden is upon the registrant to demonstrate that he is clearly within the class exempted from service in the Armed Forces. The Hearing Officer was in a position to observe the appellant and was not convinced of a conscientious opposition on his part to participation in war. There was evidence before the Appeal Board sufficient for a basis in fact for his classification.

III.

The Department of Justice did not deprive appellant of any guaranteed rights. The Department does not classify. It merely investigates a conscientious objector, and makes recommendations and a report to the Appeal Board.

Its use of the words "deep seated" in the covering letter accompanying the Hearing Officer's report was sanctioned by judicial usage and not prejudicial to the defendant.

A fair reading of the Hearing Officer's report does not bear out appellant's claim that he proceeded on a theory that long participation in a religion opposed to war was necessary for exemption.

IV.

The defendant was not entitled to access to the Federal Bureau of Investigation report since it was not material to any issues in the case. In addition, the Supreme Court in *United States v. Nugent,* Infra, held that in Selective Service proceedings there is no right to subpoena such reports.

ARGUMENT.

I. THE BOARD HAD BASIS IN FACT FOR DENYING APPELLANT'S CLAIM FOR EXEMPTION AS A MINISTER.

Exemption from the duty of service in the Armed Forces is not a matter of constitutional right (*Imboden v. United States,* 194 F. (2d) 508; *George v. United States,* 196 F. (2d) 445; *Roodenko v. United*

States, 147 F. (2d) 752). Exemption springs from statute. Who is within the exemption must be determined by the terms of the Congressional grant. Congress provided that regular or duly ordained ministers of religion and students preparing for the ministry, as defined by the Universal Military Training and Service Act, shall be exempt from training and service. The burden is on the registrant to bring himself clearly within the exempted classification. (*Swaczyk v. United States,* 156 F. (2d) 17).

It is universally admitted that Courts have no power to classify one indicted for violation of the Selective Service law (*Cox v. United States,* 157 F. (2d) 787, 789). The body which is authorized to make the factual determination as to whether a registrant comes within the classification is the local draft board (*Estep v. United States,* 327 U.S. 114, 122-123).

As said in *Cox v. United States,* 332 U.S. 442, 448-452,

> "The provision making the decisions of the local board 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The *Estep* case, supra, held that a Court may not interfere with the decision of a Selective Service System except in a case where the board acted without jurisdiction because there was no factual basis whatever upon which it could proceed. The Supreme Court held at page 451 that when only a small period of time was spent as a minister, "this fact alone" was enough to justify the board denying a minister's classification.

In the instant case the defendant is a member of Jehovah's Witnesses, all members of which claim to be ministers of religion. It cannot be supposed that a registrant's word alone is determinative of this question. In *Martin v. United States,* 190 F. (2d) 775, 777, it was said:

> "Congress undoubtedly intended to exempt such persons as ~~students~~ stand in the same relationship to the religious organizations of which they are members, as do regularly ordained ministers of older and better known religious denominations."

In the instant case the defendant was apparently attending San Francisco City College with a view to obtaining a degree in philosophy at the time of his hearing before the Hearing Officer of the Department of Justice (page 131, file). Appellant apparently attends a lecture given by another minister at a main meeting place of Jehovah's Witnesses at Kingdom Hall on Sundays (page 95, file). The time apparently devoted to ministerial studies seems to be one hour on Friday nights, Sunday public lectures, and home study of the Bible (page 96, file). Although appellant tes-

tified before the Board that he occupied the position of overseer in the Jehovah's Witnesses organization (page 92, file), a reading of the transcript of the testimony before the Local Board (pages 90 to 98, file) seems to justify an inference that appellant occupied an intermediate rather than a principal ministerial assignment. His main tasks seem to be soliciting converts in the Mission district (page 94, file) and delivering lectures to groups of people numbering no more than seven (page 94, file).

Section 456(g) of Title 50 U.S.C. provides that only

> "students preparing for the ministry under the direction of recognized churches or religious organization, who are satisfactorily pursuing *full time* courses of instruction in recognized theological or divinity schools * * * shall be exempted from training and service." (Italics supplied.)

Since the Hearing Officer found evidence that the defendant was studying at City College of San Francisco aiming towards a degree in philosophy, it is submitted that there was evidence before the Appeal Board justifying the inference that the defendant was not enrolled in a full time recognized divinity school even though he testified to his attendance at the Mission Unit of Theocratic Ministry School of Jehovah's Witnesses. Under the law as it now stands the Board had a basis in fact for its classification, and the District Court could have come to no other conclusion than it did.

II. THE LOCAL BOARD HAD BASIS IN FACT FOR DENYING APPELLANT EXEMPTION AS A CONSCIENTIOUS OBJECTOR, CLASS I-O.

The appellant registered for the draft in September, 1949. At that time he did not answer any questions regarding any claim of conscientious objection to combatant training and service in the Armed Forces of the United States. He testified that he became an ordained minister of Jehovah's Witnesses on September 3, 1950 (page 90, file). It must be remembered that the Korean war began several months prior to that time. Another coincidence is involved in the time at which his Jehovah's Witnesses study began. He testified that he began to seriously study this religion in November, 1949, approximately two months after he registered for the draft (page 15, file).

The Local Board and the Hearing Officer of the Department of Justice were in a position to observe the defendant's demeanor and to take cognizance of all those intangible factors which are involved when a witness is before a tribunal in person. They came to the conclusion that appellant was not, by reason of religious training and belief, conscientiously opposed to participation in war in any form. The burden is upon the registrant to demonstrate that he is clearly within the exempted class (*Swaczyk v. United States,* Supra; *Seel v. United States,* 133 F. (2d) 1015). In *United States v. Annett,* 108 F. Supp. 400, a finding that the defendant did not have the humility ordinarily incumbent to conscientious objection to war was held a sufficient basis in fact for a determination

that the defendant was not conscientiously opposed to war.

It is submitted that the facts which may be found in appellant's file give more than a reasonable basis to the Selective Service System's classification. The Hearing Officer's conclusion in his report was obviously a determination that although defendant was apparently religious, he had not convinced the Hearing Officer that this religious belief rose to the standard required by Section 456(j) of Title 50 U.S.C. Even if this Honorable Court should come to a different conclusion, nevertheless the scope of review which Congress gave over the Federal determinations of the Selective Service Boards requires it to sustain the present determination.

The finding of the Hearing Officer of the Department of Justice is, of course, only advisory. The Hearing Officer's report is merely a recommendation, and the Board of Appeals is not required to accept it (*Imboden v. United States,* Supra). A reading of the Department of Justice report demonstrates that this officer was far from believing that the character and good faith of the objections of Mr. Schuman justified a finding that he was conscientiously opposed to participation in war in any form (pages 130 to 132, file).

We submit to this Court the conclusion of United States District Judge Monroe M. Friedman who tried the case:

> "The question before the Court is not whether the preponderance of the evidence would be in

favor of a conscientious objector; the Court is not permitted under the laws to indulge in that. All this Court has to decide is as to whether or not there is any basis in fact whatsoever, and from all of the evidence presented there is no conclusion that the Court can come to except there is a basis in fact.

"It might very well be, if this Court were sitting on a Board—as a matter of fact, I did sit on a Board many years ago. Many of these cases I found for exemption as a minority member, but I am not permitted to do that now in this case, and the law has to be followed.

"It is therefore the duty of this Court and the Court does find the defendant guilty."

III. THE DEPARTMENT OF JUSTICE DID NOT DEPRIVE APPELLANT OF ANY RIGHTS GUARANTEED TO HIM BY LAW.

The recommendation of the Department of Justice is not binding upon the Appeal Board (*Imboden v. United States,* Supra). When the Appeal Board reviews the case it reviews *de novo* and its classification supersedes any other action (*Cramer v. France* (9th Cir.), 148 F. (2d) 801).

Appellant here is not complaining that the Hearing Officer made his decision on any matter not before the Appeal Board. His only objection goes to the Department's use of the words "deep seated" in the covering letter which accompanied the Hearing Officer's report. These particular words have been used by the Federal judiciary (see *United States v. Bouziden,*

108 F. Supp. 395, 397). It would seem that Congress would not have intended to exempt persons with light and transient objections to war. The word "conscientious" in the context in which it is found in the Selective Service statute would seem to impel the conclusion that deep seated conscientiousness is meant. However, the conclusion of the Hearing Officer is expressed at page 132 of Government's file in perhaps less confusing terminology. The recommendation of the Department of Justice was obviously based upon this report, and the Appeal Board not being bound by the recommendation would naturally go to the substance upon which it was based.

A fair reading of that substance reveals that the basis of the Hearing Officer's conclusion was not that length of time is a requirement for conscientious objector status but that length of time is one extrinsic factor in determining whether or not a defendant sincerely holds the views required by statute for exemption. As has been previously pointed out the times that this appellant became first interested and then converted form a suspicious circumstance bearing beyond his belief. The judgment of the Hearing Officer was, fairly read, that despite some showing to the contrary by appellant, he could not find the conscientiousness required by statute.

IV. THE DISTRICT COURT DID NOT ERR IN REFUSING APPELLANT ACCESS TO THE FEDERAL BUREAU OF INVESTIGATION REPORT.

Order 3229 of the Department of Justice provides that whenever an officer or employee is served with a subpoena to produce official files or documents, he shall decline to furnish the information in the absence of instructions of the Attorney General to the contrary. The general rules concerning the availability of FBI reports are discussed in *Touhy v. Ragen,* 340 U.S. 462. In that case the Supreme Court decided that in no event could a defendant secure such reports unless necessity to the defense outweighed the interests of the public in secrecy and unless they were material to important matters properly in issue in the case. *United States v. Nugent,* 346 U.S. 1, has held that registrants in a Selective Service case are not entitled to the use of FBI reports. In addition, the District Court, after examination of the reports in question, found that there was nothing in them material "as far as the issues of this case are concerned" (Tr. 70).

Inasmuch as the trial Court read the reports and found they were not material to the defense and in view of the *Nugent* case, it is submitted that no error in this ruling has been shown.

V. CONCLUSION.

For the reasons hereinabove set forth the United States submits that no error has been shown in the conviction of David Don Schuman. Accordingly, the United States requests that the judgment be affirmed.

Dated, San Francisco, California,
August 14, 1953.

Respectfully submitted,
LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

EXHIBIT A

INDICTMENT

(Violation: Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a).)

The Grand Jury charges: THAT

DAVID DON SCHUMAN,

defendant herein, being a male citizen, of the age of 22 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948", as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act", hereinafter called "said Act", and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 38 of the Selective Service System in the City and County of San Francisco, State of California, which said Local Board No. 38 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 28th day of August, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A,

and having theretofore been duly ordered by his said Local Board No. 38 to report at San Francisco, California, on the 28th day of August, 1952, for induction into the Armed Forces of the United States, and having so reported, did then and there knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill.

EXHIBIT B

STATUTES

The applicable statutes read as follows:

Title 50, Appendix 456 (j)

"Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health,

safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462, of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inqury, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work

contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]."

Title 50, Appendix 462(a).

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the

requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing.

No. 13,692

IN THE

United States Court of Appeals
For the Ninth Circuit

David Don Schuman, *Appellant,* vs. United States of America, *Appellee.*	}

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S PETITION FOR A REHEARING.

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No. 13,692

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID DON SCHUMAN,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

JURISDICTION.

Jurisdiction is invoked under Rule 25 of the Rules of the Court of Appeals for the Ninth Circuit.

PRELIMINARY STATEMENT.

When a case has been submitted for decision ordinarily the judgment of the Court of Appeals should

be accepted or appeal made to higher authority. The reasons for this are two-fold. First, the Court of Appeals has not reached its decision without thought and deliberation and further argument will probably not change minds committed to decision. Second, the Court probably feels itself bound by the Supreme Court to which appeal may be made directly.

In the instant case, however, this Court did not have the benefit (whatever benefit that might be) of a brief by the United States on the problems raised by the *Dickinson* case which was decided after briefs were filed.

Immediately after a skirmish is lost there is a very human tendency to think that the war is over. When the Supreme Court rules on a subject, the natural inclination is to think that law has taken an abrupt change of direction. More sober reflection may, however, indicate that such is not the case.

The United States is requesting this Court to take a second look at the problem before it. It makes this request not in the spirit of a poor loser, but because of the grave consequences this decision will have on the defense of the United States.

Few American boys want to go into the service. Army life is the very antithesis of the democratic living for which the average young man is trained. In time of war the majority is impelled by patriotism to submit to the disagreeable necessity. In time of peace, however, few people have the inclination to serve the tiresome lonely years which are required if the United

States is to remain strong. Each searches for an honorable way to avoid serving. Religion is an obvious and natural place to turn. The decision of this Court makes it the refuge from the duties which living in the modern world demands.

In a broad sense every American is a conscientious objector. War and regimentation are un-American. What person does not feel that "war, in any form," is wrong and who would suggest that feeling is not also held by the churches. A line must be drawn between the natural abhorrence to war of every American and every Christian, and the beliefs which Congress intended should be grounds for exemption. The necessities of this country cannot and should not be defeated by empty ordination or the simple affirmation of conscientious scruples.

David Don Schuman is a normal American college student. He has avoided the draft by a few hours' street solicitation and the normal activities of a member of "The Christian Endeavor" or a devout Catholic layman. All other American boys will not follow his example, but the substantial number who will might cripple the Selective Service Act. Most religions require strenuous and lengthy study before a man may become a minister; Jehovah's Witnesses do not. To a substantial number of men a part time activity as a minister of even an unpopular sect, is preferable to lonely duty in an Aleutian or Korean outpost. This Court's decision gives exemption from the draft to any boy who applies for and is granted the slip of paper

which constitutes God's ordination for preaching, as far as Jehovah's Witnesses are concerned. This decision gives exemption to anyone on the mere claim of opposition to war. This Court has given the honorable way out that most young men are seeking. Rest assured, they will not be slow in taking advantage of it.

QUESTIONS.

The problems in this case fall into two categories:

(1) Was there basis in the record to conclude that David Don Schuman had not satisfied his burden of proving that he was exempt from service as a minister?

(2) Was there basis in the record to find that Schuman had not satisfied his burden of proving he was exempt from service as a conscientious objector?

ARGUMENT.

I.

DAVID DON SCHUMAN IS NOT A "PRESIDING MINISTER".

This Court's opinion says that the evidence in the file tends to prove that the defendant's "position in the Witnesses sect is that of a 'presiding minister' or 'overseer.' " If this were true the United States would not be urging that a rehearing be granted.

This Court realizes that one of the conditions to exemption as a minister is that the defendant be

"recognized as a minister by the other members of the sect." We presume that when the term "presiding minister" was used in the opinion, the Court had reference to *Dickinson v. United States,* decided November 30, 1953. The Supreme Court there described Dickinson's status as follows: "As of January 1950 Dickinson changed his residence in order to assume the role of 'company servant' or *presiding minister* of the Coalinga, California 'company' which encompassed a 5400 square mile area." (Emphasis added.) The Court described Dickinson's ministerial activities as a presiding minister in this way: "A substantial portion of this time was spent conducting three to four meetings each week of the 'company' or congregation at a public hall in Coalinga. Dickinson arranged for and presided over these meetings, usually delivering discourses at them."

The Supreme Court and this Court when using the term "presiding minister" obviously have reference to the individual who is the leader of his particular congregation.

The only evidence that Schuman's position was of this character must be gathered from his personal appearance before the Selective Service Board. There the following occurred:

> "'Mr. Dooley. You are asking us to defer you on the grounds you are an ordained minister. Do you have a church assigned to you?
>
> Registrant. I am an overseer. If I may present this to the board. (Registrant presented

written statement, date September 30, 1951, stating he serves as a presiding minister.)

Mr. Dooley. This is dated September 30, 1951 on the letter-head of San Francisco Mission Unit of Jehovah's Witnesses, or 23rd and Shotwell, and has been notarized. ,

Registrant. May I have that in my file, please.

Statement was stamped as having been received October 8, 1951 and placed in registrant's file." (File 92).

The Court will notice that a written statement is there referred to. The following is a copy of this statement:

"San Francisco Mission Unit of
Jehovah's Witnesses
23rd & Shotwell Streets, San Francisco 10, California
Valencia 4-8425
September 30, 1951

Affidavit:

The following statement is made by Verne G. Reusch, presiding minister of the San Francisco Mission District congregation of Jehovah's Witnesses, on behalf of David Schuman. I know David Schuman to be an associated and active minister in the Mission District congregation of Jehovah's Witnesses to be enrolled in the Theocratic Ministry School at our local headquarters of the above address. I have noted his regular attendance, his application to his studies, and the practical use of his training in the work of preaching the Gospel.

Due to the diligence thus shown, he has been found qualified to serve as a presiding minister

in one of the regularly conducted Bible study groups within the local congregation's territory.

/s/ Verne G. Reusch
Presiding Minister

Subscribed and sworn to before me this 1st day of October, 1951.

/s/ Barbara Alexa,
Notary Public in and for the City and County of San Francisco, State of California".

This letter is marked "Received by Local Board No. 38 on October 8, 1951." (File 88).

It is to be noted that this affidavit is signed by Verne G. Reusch, *Presiding Minister* of the San Francisco Mission District Congregation of Jehovah's Witnesses. Mr. Reusch establishes three facts: (1) That Schuman is a member of the Mission District Congregation; (2) that he is enrolled in a theocratic ministry school;[1] (3) that he is serving as a presiding minister of a bible study group within the local congregation's territory. Presumably a bible study group encompasses small numbers of the main congregation. Schuman occupies a position probably analogous to the Sunday

---

[1]Schuman's studies at the Theocratic Ministry School were only part time, amounting to apparently one hour a week on Friday nights (92 File). Section 6(g) of the Universal Military Service & Training Act of 1948 provides for exemption for "students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing *full time* courses of instruction in recognized theological or divinity schools." (Emphasis added.) The record is clear that Schuman does not fall within this class.

school teachers who instruct small groups before the regular service in many Protestant sects.

The conclusion that Verne G. Reusch is presiding minister of the San Francisco Mission District congregation and Schuman is not, is borne out by Schuman's answer to question 2(d) of his conscientious objector form 150 (73 File). There Schuman was asked the name, title and present address of the "pastor or leader of such church, congregation or meeting." In answer to this question Schuman listed "Verne G. Reusch, Company Servant, 2720 San Jose Avenue; San Francisco, California" (73 File).

This Court has cited *Martin v. United States,* 190 F.2d 775, for the proposition that Congress intended to exempt such persons as stand in the same relationship to the religious organizations of which they are members as do regularly ordained ministers of older and better known religious denominations. If Schuman were "presiding minister" of his congregation, he would fall within the rule enunciated by this and other Courts. Schuman, however, is not the shepherd, but is part of the flock. There is not only basis in fact for finding that he is not a presiding minister in any ordinary sense, but the evidence presented admits of no other conclusion.

Schuman had not given up secular work and studies.

This Court makes the statement that Schuman had given up all secular work and studies because they interfered with his religious studies. Schuman, to be

sure, made such a statement in his appearance before the local board. However, the Hearing Officer of the Department of Justice found that at the time of his hearing he was attending San Francisco City College (131 File). A statement implying that Schuman devoted all his time to religious activities is misleading and does not reflect the true facts.

Holding Schuman a minister is inconsistent with decisions of the Supreme Court.

The Court of Appeals bases its decision that the Selective Service System acted beyond its jurisdiction upon the following facts which appear in the Selective Service file:

(1) That Schuman had given up all secular work and studies.

(This statement does not correctly reflect the situation. The true fact is that Schuman was going to college and doing Jehovah's Witness work part time.)

(2) That Schuman's position was that of a "presiding minister".

(There is no evidence at all that Schuman was a "presiding minister". The only presiding he did was over a bible study group.)

(3) That Schuman gave lectures, performed marriages, and spoke at funerals.

In *Cox v. United States,* 332 U.S. 442, the Supreme Court developed, at page 444:

(1) That Petitioner Cox's "entire time was devoted to missionary work";

(2) That the file contained "an affidavit of a Company Servant, Cox's church superior * * * stating that Cox regularly and customarily serves as a minister by going from house to house and conducting bible studies and bible talks";

(3) That "he was enrolled in the 'Pioneer Service' * * *";

(4) That he averages 150 hours per month in ministerial duties;

(5) "As a minister * * * he preached from house to house, conducted funerals, and instructed the bible in homes."

The Supreme Court held under the Cox facts that the Selective Service Board was justified in deciding that Cox had not established his ministerial status.

Schuman is not a Pioneer as Cox was, nor does he devote 150 hours per month to ministerial duties. He does not devote his "entire time" to missionary work. He, along with Cox, conducts bible studies. The fact that Schuman *claims* to be a "presiding minister" of a bible study group cannot change the fact that his and Cox's position and activities were the same. Cox also conducted funerals. The only extra allegation in Schuman's case is that he can perform marriages. Cox, however, had a "Pioneer" classification, which Schuman did not, and Cox spent much more time in ministerial work.

In the *Cox* case other defendants also were petitioners. At page 445 to 446 the facts in petitioner *Thompson's* case were reviewed

(1) Thompson conducted "studies at the 'Local Kingdom Hall' ";

(2) "He was serving as assistant Company Servant";

(3) "He was a 'school instructor in a course in theocratic ministry' ";

(4) He served as "advertising servant and book study conductor".

Thompson was assistant to the presiding minister or "Company servant" of the Jehovah's Witness congregation where Schuman was merely the conductor of a bible study group within the congregation. In addition, Thompson was a Theocratic Ministry Instructor, while Schuman was merely a student in the Theocratic Ministry School. Thompson also did the work of advertising servant and book study conductor. The Supreme Court, nevertheless, held that Thompson had not as a matter of law, satisfied his burden of proving he was a minister.

Cox v. United States, 332 U.S. 442, approves as a "proper guide", the following test of the Selective Service System in determining whether or not Jehovah's Witnesses are ministers:

> "* * * 'whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which

regular or duly ordained ministers of other religions are ordinarily regarded.' "
Cox v. United States, supra, 450.

In Schuman's case the uncontradicted evidence establishes that he *is not* "regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded". To be sure, the evidence which bears upon this issue was supplied by Mr. Schuman. However, it cannot be contended that evidence favorable to the position of the Selective Service System must be rejected because supplied by the registrant. In addition, it cannot be maintained that the mere fact the Selective Service System did not conduct a judicial trial or present a "government case" automatically requires acquittal of the defendant.

The evidence establishes that Schuman belongs to the Mission District Congregation of Jehovah's Witnesses. The leader of that Mission Unit is Mr. Reusch. He, not Schuman, is regarded in the same manner as ministers of other religions. He, not Schuman, stands in the same relationship to the religious organization of which Schuman is a member as do regularly ordained ministers of older and better known religious denominations. The pastor, not a mere member of the congregation, is entitled to the ministerial exemption. *Sunal v. Large,* 157 F. 2d 165, 175. Schuman is a mere member of the congregation. The fact that all members of his church are ministers under the

rules of the church does not make him a minister under the Act. *Tyrrell v. U. S.,* 200 F. 2d 8, 13.

Congress said "final".

> "At the outset it is important to underline an important feature of this case. The Universal Military Training & Service Act does not permit direct judicial review of Selective Service classification orders. Rather the Act provides as the 1917 and 1940 conscription acts before it, that classification orders by Selective Service authorities shall be 'final.' "
>
> *Dickinson v. United States,* supra 4.

The discussion of the evidence in this case must be considered against the background of the Selective Service Act. Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local board made in conformity with the regulations are final, even though they may be erroneous. The question of the jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. *Estep v. United States,* 327 U.S. 114, 122-123; *Dickinson v. United States,* supra 4.

This Court in the Schuman case appears to be of the opinion that if there was any evidence before the Selective Service Board which would tend to

support the position the registrant takes, a Court must decide that the jurisdiction of the board was exceeded.

In the pages preceding this one, facts have been listed which logically and practically tend to prove that Schuman is not a minister under the Act. The *Dickinson* case does not and cannot mean that Courts must reject this evidence and accept the position of the registrant. If this were true, the "customary scope of judicial review" over administrative action would actually be far exceeded. The decisions of administrative boards are, generally speaking, upheld if there is substantial evidence to support them. Even in judicial trials favorable inferences are indulged in to support a verdict. The United States is convinced that the weight of the evidence is heavily in favor of the proposition that Schuman is not a "minister". However, the burden is not upon the United States. The law is unchanged that the only duty which is incumbent upon the United States is to show that the jurisdiction of the Selective Service System has not been exceeded. *Estep v. United States,* 327 U.S. 114; *Dickinson v. United States,* supra; *Cox v. United States,* supra.

Interpreted in this light, we have a case where an administrative board found that a registrant who admitted that another person was the presiding minister of the congregation to which he belonged, whose only claim to authority over others in his congregation consisted in conducting bible classes, and whose

duties as a minister occupied so little time as to allow him to pursue full time instruction at a college, was not entitled to a ministerial exemption. This Court has decided that this finding was beyond the jurisdiction of the local board. This decision seems to the United States to be clearly wrong.

Holding Schuman a minister is inconsistent with the Dickinson case.

A reading of the *Dickinson* case establishes that the defendant was:

(1) "A full time 'Pioneer' minister";

(2) "He devoted '150 hours' each month to religious efforts";

(3) "These activities began 'after February 1949 when selection under the Act was at a standstill, regular inductions having been halted' ";

(4) "He was 'company servant' or presiding minister of the Coalinga, California 'company' ";

(5) "He arranged for and presided over the meeting of the 'company' or congregation and usually delivered discourses at them";

(6) "He worked at secular tasks for a weekly average of only five hours."

Compare Dickinson's qualifications with Schuman's.

The Court of Appeals found that the following facts established that Schuman was a minister:

(1) That Schuman presided over a bible study group;

(2) That Schuman gave lectures, performed marriages and spoke at funerals;

(3) That Schuman studied philosophy at San Francisco City College.

It is to be noted that Schuman is not a Pioneer minister as Dickinson was. Schuman did not devote 150 hours each month to religious efforts. Schuman was not a company servant. Schuman was not a presiding minister of a company. Schuman did not arrange for or preside over the congregation. Schuman spent more than five hours a week in secular activity. Schuman became a minister only a month after the Korean war.

"A ministerial exemption as was pointed out in the Senate Report accompanying the 1948 Act 'is a narrow one intended for the *leaders* of the various religious faiths and not for the members generally.' " S. Rep. No. 1268, 80th Congress 2nd Sess. 13; *Dickinson v. United States,* supra 4. The evidence clearly establishes that Schuman is not a leader. His only claim of leadership consists in presiding over a bible study group. This he characterizes as "presiding minister" duty. This bible group is a subsidiary of the main congregation. The closest analogy to it would be a Sunday School class. This same activity can be found in prior Supreme Court cases to which the United States has drawn this Court's attention. See *Cox v. United States,* supra.

"Each registrant must satisfy the Act's rigid criteria for the exemption." *Dickinson v. United States,* supra 5. The ministerial exemption is a matter of legislative grace. "The Selective Service registrant bears the burden of clearly establishing a right to the exemption." *Dickinson v. United States,* supra 5. Schuman has not established a right to the exemption which he sought. He established that he engaged in religious activities for part of his time. He did not establish that he was a leader or presiding minister. He did not establish that other Jehovah's Witnesses regarded him in the same manner as members of other religious organizations regarded their ministers. Schuman was not a "Pioneer Minister" preaching 150 hours per month. "Preaching and teaching the principles of one sect, if performed part time or half time occasionally, or irregularly, are insufficient to bring a registrant under 6-G." *Dickinson v. United States,* supra 5. Schuman has established only that he was a full time college student who devoted part time to religious activity. His "customary vocation" was college student, not a minister.

It must be recognized that Selective Service must "be geared to meet the imperative needs of mobilization and national vigilance when there is no time for 'litigious interpretation.'" *United States v. Nugent,* 346 U.S. 1, 10.

In deciding whether this Court should reconsider its decision that Schuman is a minister under the

statute, we ask that each judge put himself in the position of a member of a draft board.

(1) Would he, if Schuman had appeared before him, find that Schuman had the vocation of a minister of religion?

(2) Under what circumstances can he, if the Schuman case remains the law, ever find that a boy who *claims* ministerial status, is not entitled to exemption from military service?

(3) What effect would conducting Selective Service classification, like trials in the United States District Court have on the functioning of the agency which has the responsibility of supplying this country's military force?

II.

SCHUMAN IS NOT A CONSCIENTIOUS OBJECTOR.

The Universal Military Service & Training Act gives exemption from service in the armed forces to those persons "who by reason of religious training and belief * * * [are] * * * conscientiously opposed to participation in war in any form." When a registrant claims to be exempt under this provision of the law, the board is faced with the problem of determining what is going on in the registrant's mind. Whether or not an individual is a minister can be determined upon the basis of observable facts. However, when the ultimate issue concerns a mental

phenomenon, a different and more complex task confronts the trier of the fact.

If a registrant repeats the words of the statute, what method can there be to prove that he does not fit within the exemption granted? The Selective Service Board has no machine which can probe the inside of a man's mind. It does not have the personnel, the time, or the funds to conduct extensive investigations into the history of the registrant to find statements inconsistent with those which the registrant makes at the time of his personal appearance. Classification is not a judicial trial. *U. S. v. Nugent,* supra. This Court cannot have intended to require a Selective Service Board to present a "government case".

This Court will not ordinarily upset the finding of a jury that a defendant had criminal intent. The reason behind this is that a Court of Appeals, with nothing but the cold record before it, does not feel competent to rule on a question which involves the examination of the state of mind of a defendant. Men form their beliefs in many ways. The objective manifestations of that belief are few and untrustworthy.

In examining this problem, the United States asks that the Court of Appeals consider for a moment what kind of evidence conceivably could refute an individual's assertion of a particular belief. If the defendant has at other times made statements contrary to his present position, this will probably be relevant evidence. However, if he says he has changed

his mind, how can he be refuted? Consider also the enormous expense involved in investigating an individual's previous statements of philosophy. Consider also the delay which such a procedure would involve.

This Court has held that the length of time one has been connected with a faith *has no bearing* upon whether one is entitled to exemption as a conscientious objector. If a board cannot consider the length of time an individual has claimed a belief, what other evidence can it utilize? One answer would be the manner of his testimony. However, if the Courts require "affirmative evidence" of lack of conscientious scruples, how is a board member to show his mistrust in the record? Certainly a description of the physical manifestations which comprise the manner of the registrant would not influence this Court. A listing of such things as "a shady look in the eyes", "a halting method of speaking", a "too-glib recitation of belief", would be considered by this Court to be suspicion and speculation.

The Dickinson case does not apply.

When faced with determining the beliefs of a registrant concerning the use of force, the Selective Service Board has a different problem than when it seeks to decide whether he is a minister. The *Dickinson* case, while it involves a Jehovah's Witness, is not concerned with the problem of exemption under 6-J of the Universal Military Training & Service Act. It makes no ruling on what kind of evidence can be utilized by the board in finding that a registrant is or

is not conscientiously opposed to war. It rules only on the exemption under 6-G of the Act. The problems are different, we hope that the Court of Appeals will change its decision that the rule is the same.

When faced with the issue of claimed sincerity, the Selective Service System must have the right to disbelieve. If the only evidence in the record is a simple statement that the registrant is sincerely opposed to war, the Selective Service System cannot be precluded from finding, if it so believes, that the registrant had not established the sincerity required by the statute. If the ministerial exemption is "narrow and rigorous", the conscientious objector exemption is even more so. This Court had previously held that demeanor of the witness and his sincerity and candor is a matter for the trial tribunal. *Ashton v. Seatney* (9th Cir.), 145 F. 2d 719. The Supreme Court recognizes that where a decision is based upon motives and purposes, the evidence of which depends largely upon the credibility of witnesses, a particularly appropriate case is made for upholding the trier of the fact. *United States v. Oregon Medical Society,* 343 U.S. 326, 332.

Affirmative evidence is present.

The Department of Justice made a finding in the Schuman case as did the Local Board that the registrant failed to establish that his objections to service were based upon conscientious convictions arising out of religious training and belief (129, 98 File).

The evidence which supports this determination and that of the Appeal Board which actually has the power of decision[2] is:

(1) Schuman began studies of religion only two months after receiving his Selective Service classification questionnaire (4, 15 File).

(2) He claimed exemption from service for the first time shortly after the outbreak of the Korean War (17 File).

(3) He gave a lecture apparently in favor of the war to end all wars (119 File).

(4) He became a Jehovah's Witness only as a compromise of religions with his girl friend, not because of his beliefs regarding force or any devotion to its principles (131 File).

(5) He did not claim conscientious objector classification until July 24, 1951 (15 File). Before that date his only claim for exemption was as a minister[3] (74 File).

(6) The only evidence presented of Schuman's conscientious objection is his own statements in his

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[2]The Appeal Board is not bound by an ambiguous statement of the Hearing Officer of the Department of Justice, if there is evidence in the file which justifies the classification given. *Reed v. United States* (9th Cir.), 205 F. 2d 216; *Knox v. United States* (9th Cir.), 200 F. 2d 398; *Cramer v. France* (9th Cir.), 148 F. 2d 801.

[3]Prior to that time he applied for exemption as a minister, but not as a conscientious objector, on August 14, 1950 (15 File); November 9, 1950 (17 File); January 29, 1951 (22 File), and April 4, 1951 (39 File).

conscientious objector form and his statements in his personal appearance before his second Local Board (Local Board 38).

Can the Court of Appeals hold that a determination upon this evidence was beyond the jurisdiction of the Selective Service authorities?

Examination of the file in this case shows that Schuman presented voluminous evidence tending to support his claim that he was a minister. However, he presented no affidavits or statements from others supporting his claimed beliefs against force. All the evidence which bears on this question consists in statements made by him. The Appeal Board was presented with a case where the registrant said simply he would not fight or serve in the Army, and who said he did so because of religious conviction garnered from teachings of the Jehovah's Witnesses sect. However, he presented no statement from others that the creed of this sect required a conscientious objector stand.

The Appeal Board could believe that Schuman acquired his religion merely as a compromise with his girl friend. It could infer that the claim of objection so closely following the Korean War was motivated by it. The Local Board and the Hearing Officer of the Department of Justice both found that the registrant had not sustained his burden of proving conscientious objection. That finding was based in part upon the demeanor of the registrant. The Appeal Board had the right to consider that since both these tribunals denied Schuman his exemption, they disbelieved his

statement that he was opposed to war in any form on the grounds of religious training and belief. The statement which the Court of Appeals makes that the Local Board did not question the registrant's sincerity is misleading. The quoted statement appears during a discussion of Schuman's ministerial exemption. In the portion of the transcript in which the Local Board interrogated the defendant concerning his conscientious belief, no such statement appears. There is a great difference between finding a person religious and finding that he is conscientiously opposed to war in any form. Catholics, Protestants and Jews can be fervently religious and yet serve in the armed forces. After cross-examining the registrant as to his beliefs concerning force, the Local Board denied classification as a conscientious objector (97, 98 File).

Reading this portion of the transcript of Schuman's personal appearance, it is obvious that the Local Board, despite Schuman's protestations, did not believe he was a sincere *conscientious objector* and the Appeal Board, on the basis of the evidence in the file, could disbelieve the registrant's sincerity and classify him 1-A.

Schuman has not satisfied his burden.

The United States asks that this Court examine the facts developed in this discussion. Would this Court, if it were sitting as a Draft Board, find that Schuman had satisfied *his burden* of proving he was a conscientious objector? We feel sure that each individual on this Court would require more than a simple affirma-

tion of belief to grant exemption from service. Schuman could have presented affidavits concerning his beliefs about force. He could have presented statements from others as to whether he had given public expression to his views on force. We ask the Court of Appeals to examine his answers to questions concerning the objective manifestations of his belief. In answer to Question 6 in his conscientious objector form, "Have you ever given public expression, written or oral, to the views herein expressed?", Schuman answered that he was immersed at a circuit assembly of Jehovah's Witnesses. In other words, instead of showing or alleging that he had expressed at other times opposition to war, he merely repeated his claim that he was an ordained minister.

No claim can be made that the United States must submit evidence when the registrant himself has not established facts sufficient to justify his sincerity. This we believe is the case with Schuman. If this petition for rehearing is not granted, the law in the Ninth Circuit will be that if a registrant makes a simple statement that he is a conscientious objector, the Selective Service System must so classify him. This we submit cannot have been the intention of Congress. The decisions of this Court and of the Court above are unanimous that classification is not a judicial trial. The Court of Appeals cannot have intended to require the Selective Service System to present a "government case." With a record such as this one, the inference can be easily drawn that Schuman had not any more sincere opposition to war than has any other religious

young American. The Universal Military Training & Service Act and the decisions of the Courts require that if such an inference can be drawn, the Selective Service system has not acted beyond its jurisdiction in refusing a classification. *Corn Products Co. v. Comm.*, 324 U.S. 726, 734; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35.

III.

CONCLUSION.

It is almost two months since the decision in the *Dickinson* case. There has been time to reexamine the principles there involved and to absorb those principles into the context of the statute and prior cases. The United States feels confident that, placed in its proper context, the decision in the *Dickinson* case does not control here. It asks, therefore, that the Court of Appeals grant a rehearing so that the judgment of the District Court may be upheld.

Dated, San Francisco, California,
January 20, 1954.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee and Petitioner.

Certificate of Counsel.

Lloyd H. Burke and Richard H. Foster, counsel for petitioner, certify that in their judgment the foregoing petition is well founded and is not interposed for delay.

Dated, San Francisco, California,
January 20, 1954.

Lloyd H. Burke,
United States Attorney,
Richard H. Foster,
Assistant United States Attorney,
Attorneys for Appellee and Petitioner.